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United States
Circuit Court of Appeals
For the Ninth Circuit.

Apostles.
(IN THREE VOLUMES.)

RICHMOND DREDGING COMPANY, a Corporation,
Appellant,

vs.

STANDARD AMERICAN DREDGING COMPANY,
a Corporation, CALIFORNIA RECLAMATION
COMPANY, a Corporation, and ATLAS GAS
ENGINE COMPANY, a Corporation,
Appellees.

VOLUME III.
(Pages ~~641~~ to 1071, Inclusive.)

787

Upon Appeal from the United States District Court for the
Northern District of California, First Division.

FILED

FEB 25 1913

No. 2208

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VOLUME III.

(Pages 641 to 1071, Inclusive.)

Upon Appeal from the United States District Court for the
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Records of U.S. Circuit Court

of appeals

784



Standard American Dredging Company et al. 787

Price. Extension. Total.

Expenses, A. K. Gum, including R. R.

fare, board and lodging and car-

fare.....15.15 169.85

LAKE MERRITT No. 4.

Accounts Payable.

Repairs."

"SAMSON IRON WORKS,

Stockton, California.

3/3/09.

Our No.—20946.

Sold to—The Standard American Dredging Co., San
Francisco, Cal.

Extension. Total.

Freight paid C. T. Co. on gas engine pieces

from Oakland to Stockton as per freight

bills herewith enclosed.....52 .52

LAKE MERRITT No. 4.

Accounts Payable.

Repairs." [648]

"FREIGHT BILL.

SAMSON IRON WORKS,

STOCKTON.

San Francisco, Feb. 22, 1909.

To California Transportation Company, Dr.

Per Charges on Articles Waybilled Ex Steamer
ISLETON from Oakland.

Shipper.	No. Pkgs.	Articles.	Weight.	Rate.	Total.
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Standard

Amer.

Dredg. Co. 1 pc. Gas Engine			20	M.	.25
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788 *Richmond Dredging Company vs.*

Shipper.	No. Pkgs.	Articles.	Weight.	Rate.	Total.
	Apprd.	Date.	Name.		
	O-K.	3/3/9.	Kinnear.		

Received Feb. 3, 1909.

State Toll.	.01
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Trip No. 23.	Total.	.26"
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"FREIGHT BILL.

SAMSON I. W.

STOCKTON.

Feb. 18, 1909.

To California Transportation Company, Dr.

For Charges on Articles Waybilled Ex Steamer
CONSTANCE from Oakland.

Shipper.	No. Pkgs.	Articles.	Weight.	Rate.	Total.
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Standard

Amer.

Dred. Co.	6	Pc. Gas. Eng.	250	10	.25
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Apprd.	Date.	Name.
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O-K.	3/3/9	Kinnear.
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Received Feb. 3, 1909.

Way Bill No. 315.	State Toll.	1
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Trip No. 16.	Total	26"
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[649]

"STANDARD AMERICAN DREDGING CO.

San Francisco, Mar. 1, 1909.

To Samson Iron Works, Dr.

Date.	Items.	Amount.	Total.
February 20.	To invoices attached		
	as per list.....	20.00	

(Deposition of Raymond A. Perry.)

Date.	Items.	Amount.	Total.
February 20.	To invoices attached as per list.....	64.49	
February 24.	To invoices attached as per list.....	4.25	
February 24.	To invoices attached as per list.....	46.40	
February 27.	To invoices attached as per list.....	169.85	
March 3.	To invoices attached as per list.....	.52	305.51

Received Sep. 4, 1909, of Standard American Dredging Co., Three hundred & five 51/100 Dollars.

SAMSON IRON WORKS.

In full of above account.

\$305 51/100

Sign here—By F. B. HUBBARD.”

Q. I hand you a second package of bills, Mr. Perry, the first one being apparently a bill from the United Iron Works, dated October 18th, 1909, and ask you whether or not these bills represent repairs made by you on the gas engine which was originally on the “Richmond No. 1”?

A. Yes, sir, they do. The bills have been paid.

Mr. LILLICK.—I offer these in evidence and ask that they be marked Claimant’s Exhibit No. 8.

(The bills are marked “Claimant’s Exhibit No. 8” and are as follows:) [650]

[Claimant's Exhibit No. 8.]**"UNITED IRON WORKS.**

Oakland, Cal., Oct. 12th, 1909.

Sold to STANDARD AMERICAN DREDGING
CO.1 pc. $\frac{1}{4}$ " x 24" Brass tubing.....12 14 - 20" x $\frac{1}{2}$ " Machine screws..... .35

#8

Repairs G. E.

O. K.—KNIGHT."

"UNITED IRON WORKS.

Oakland, Cal., October 20th, 1909.

Sold to STANDARD AMERICAN DREDGING
CO.

To boring and bushing 6 valve chambers for

gas engine 11.75

#8

Repairs Gas Engine.

O. K.—KNIGHT."

"UNITED IRON WORKS.

Oakland, Cal., October 22nd, 1909.

Sold to STANDARD AMERICAN DREDGING
CO.To making necessary repairs to gas engine
crankshaft, flywheel & friction clutch,
as follows:Welding friction clutch end of crank-
shaft, turning same true, & cutting
2 keyways. Re-cutting 2 keyways
on flywheel end, recutting keyways
in flywheel & Forging & Fitting 2
gibb head keys to same. Cutting

broken hub off friction clutch spider & boring & facing same to receive new hub. [651] Making pattern, casting & finishing new flanged hub for above friction clutch spider, fastening same in place with turned bolts, keywaying, pressing on shaft & fitting 2 keys to same. Planing traps of clutch blocks & adjusting same. Making 4 maple shoes for clutch blocks 13/16" x 15 1/2", fitting same in place & turning gauge. Forging & finishing 4—R. H. toggle levers for clutch & straightening 4—L. H. toggle levers for clutch..... \$158.70

#8.

Repairs Gas Engine.

O. K.—KNIGHT."

“UNITED IRON WORKS.

Oakland, Cal., Oct. 26th, 1909.

Sold to STANDARD AMERICAN DREDGING CO.

To making 6 special studs for gas engine 5/8" dia. one and 3/4" dia. other end 7 1/4" long. Making 2—1" dia. x 9 ft. long bolt rods 3" thread each end with nuts & washers (C 1) Making 4—1" Stirrup bolts to suit boiler (about 4'—8" dia) 6'—8" flong—Threaded one end about 3" with nut & washer; other end with eye to receive bolt. Furnishing 1—doz. 3/8" x 1 cap screws

(Deposition of R. A. Perry.)

and making 1—steel cross-head pin for
cutter engine 30.50
#8.

Repairs Gas Eng. O. K.—KNIGHT.” [652]

“UNITED IRON WORKS.

Oakland, Cal., October 27th, 1909.

Sold to STANDARD AMERICAN DREDGING
CO.

To repairing segment of friction clutch lever
for pattern, casting & finishing as per
broken one 3.70
#8.

Repairs. O. K.—KNIGHT.”

Mr. TAUGHER.—Q. Do you know the amount
of the last bills, Mr. Perry?

A. I do not. I think about \$200.

Mr. LILLICK.—Q. Mr. Perry, I hand you a let-
ter dated August 12th, 1909, which purports to be
signed by you, and ask you whether or not that is
your signature? A. Yes, sir.

Q. And whether or not that letter was sent? (Ad-
dressing Mr. Taugher.) Will you admit the re-
ceipt of this letter?

Mr. TAUGHER.—What date is it?

Mr. LILLICK.—August 12th, 1910.

Mr. TAUGHER.—We admit the receipt of this
letter.

Mr. LILLICK.—I offer this letter in evidence,
and ask that it be marked Claimant's Exhibit 81½,
and as it is produced by the libelants at our request,

we not having a carbon copy of the same present at this hearing. I will read the letter into the record, as Mr. Taugher wishes to take it away. (Reading:)

[Claimant's Exhibit No. 8½.]

**“STANDARD AMERICAN DREDGING CO.
Contractors for Dredging, Harbor Improvements
and Canal Work.**

708-712 Merchants Exchange.

San Francisco, August 12th, 1910.

**Richmond Dredging Company,
San Francisco, Cal.**

Dear Sirs: [653]

In accordance with the lease and agreement between you and this company, dated February 26, 1910, we hereby notify you that we have secured work which we desire to do by the use of the dredger ‘Oakland,’ and therefore terminate said lease, and require you to return said dredger ‘Oakland’ to us at Richmond within fifteen days after the service on you of this notice.

Yours respectfully,

**STANDARD AMERICAN DREDGING
COMPANY,**

By R. A. PERRY,

R. A. P.

President.”

Mr. LILLICK.—Mr. Taugher, have you the original of the letter of January 5th. We have a copy here, but if you have the original we can make sure of it.

Mr. TAUGHER.—I will admit a copy of it if it is

(Deposition of R. A. Perry.)

a true copy. (After examination.) It is a true copy.

Mr. LILLICK.—Q. Mr. Perry, I hand you a letter dated August 16th, 1910, which purports to be signed by H. C. Cutting, and ask you whether or not you received that on the date on which it was sent or very nearly thereto? (Handing.)

A. Yes, sir, I received this letter.

Mr. LILLICK.—We offer this letter in evidence and ask that it be marked "Claimant's Exhibit No. 9." (Addressing Mr. Taugher.) Do you admit that letter as having been sent, Mr. Taugher?

Mr. TAUGHER.—Yes, it is Mr. Cutting's signature.

Mr. LILLICK.—Q. Do you know Mr. Cutting's signature, Mr. Perry? A. Yes, sir.

Q. Is that his signature? (Handing letter of August 16th, 1910, to witness.)

A. I believe it is. [654]

(The letter is marked "Claimant's Exhibit No. 9" and is as follows:)

[Claimant's Exhibit No. 9.]

"RICHMOND DREDGING COMPANY.

Incorporated.

General Office—915-919 Monadnock Bldg.

Market and Third Streets.

San Francisco, August 16th, 1910.

Standard American Dredging Co.,

San Francisco, California.

Gentlemen:

Your communication of even date, specifying a

(Deposition of R. A. Perry.)

number of things which you say are necessary to put your dredger 'Oakland' in good condition is just at hand. I wish to state that its the *unanonous* opinion of all the men who have had the dredger in hand during the continuation of our contract that your dredger is in better condition by far than it was when we received it. If there are a few connections worn out or a few bearings needing babetting you will have to accept that under the head of reasonable wear and tear. As to the shovels and spikes, I cannot say whether there was two dozen shovels and a keg of spikes on board when we received it or not, but if you say there was and you feel that *there* use does not come under the head of reasonable wear and tear, we will supply the shovels and the spikes at your demand.

Again we notify you that we are through with the dredger and that it is at your disposal and risk in the canal at Richmond.

Yours truly,

H. C. CUTTING,

For Richmond Dredging Company."

Q. I hand you a letter, Mr. Perry, dated August 16th, 1910, [655] which is also apparently signed by H. C. Cutting, and ask you whether you received it. A. Yes, sir; I received it.

Q. Is that Mr. Cutting's signature? (Pointing.)

A. Yes, sir.

Mr. LILLICK.—Will you admit that, Mr. Taugher, as having been sent?

Mr. TAUGHER.—Yes.

Mr. LILLICK.—I offer this letter in evidence and ask that it be marked Claimant's Exhibit No. 10.

(The letter is marked "Claimant's Exhibit No. 10" and is as follows:)

[Claimant's Exhibit No. 10.]

"RICHMOND DREDGING COMPANY.

Incorporated.

General Office—915-919 Monadnock Bldg.

Market and Third Streets.

San Francisco, August 16th, 1910.

Standard American Dredging Co.,

Merchants Exchange Bldg., City.

Gentlemen:

Confirming our conversation of yesterday afternoon we wish to notify you that we have completed the work which we desire to do with your Dredge Oakland and that it is now in the Richmond canal at your disposal and risk.

We hereby make demand on you for the immediate return to us at Richmond of our dredger, Richmond No. 1, as per our contract.

Very truly yours,

RICHMOND DREDGING COMPANY,

H. C. CUTTING."

Q. I hand you a document marked "Notice demanding return of Dredger, etc." Also purporting to be signed "Richmond Dredging Company by H. C. Cutting, Pres.," and ask you whether or not you recognize Mr. Cutting's signature, and whether or not you received it?

(Deposition of R. A. Perry.)

A. Yes, sir, that was received.

Mr. LILLICK.—Will you admit having sent that to us, Mr. Taugher?

Mr. TAUGHER.—We admit having sent or delivered that to you. [656] Do you mean sent by mail?

Mr. LILLICK.—It does not matter, just as long as we received it.

Mr. TAUGHER.—All right.

Mr. LILLICK.—I offer this paper in evidence and ask that it be marked Claimant's Exhibit No. 11.

(The paper is marked "Claimant's Exhibit No. 11" and is as follows:)

[Claimant's Exhibit No. 11.]

**"To the STANDARD AMERICAN DREDGING
COMPANY,**

San Francisco, Cal.

Richmond Dredging Company hereby again makes further and repeated demand for the immediate return to it of the dredger 'Richmond No. 1.'

Demand was made upon Standard American Dredging Company on the 14th and on the 16th of August, 1910, for the immediate return to Richmond Dredging Company of the dredger 'Richmond No. 1' but the said dredger has not been returned.

As you have already been notified, Richmond Dredging Company has use for and now requires the dredger 'Richmond No. 1,' and said Richmond Dredging Company has heretofore terminated, and now hereby terminates the lease or agreement under which you took and now hold possession of said

(Deposition of R. A. Perry.)

dredger 'Richmond No. 1' and again demands the immediate return of said dredger.

You will further take notice that Richmond Dredging Company will claim fifty (\$50.00) dollars per day for the use of said dredger 'Richmond No. 1' for every day that it is entitled to claim that amount under the agreement by virtue of which you hold said dredger or otherwise.

It is suggested that a representative of Standard American Dredging Company meet a representative of Richmond Dredging Company without delay for the purpose of adjusting the [657] accounts between said companies.

Dated at San Francisco this 1st day of September, 1910.

RICHMOND DREDGING COMPANY.

By H. C. CUTTING, Pres."

Q. Mr. Perry, I hand you a letter dated July 14th, 1910, which purports to be signed by "Richmond Dredging Company, H. W. Wernse, Sec.," and ask you whether or not you received that (handing).

A. Yes, sir.

Mr. LILLICK.—Will you admit having sent that, Mr. Taugher?

Mr. TAUGHER.—Yes.

Mr. LILLICK.—We offer this letter in evidence and ask that it be marked Claimant's Exhibit No. 12.

(The letter is marked "Claimant's Exhibit No. 12" and is as follows:)

(Deposition of R. A. Perry.)

[Claimant's Exhibit No. 12.]

“RICHMOND DREDGING COMPANY.

Incorporated.

General Office—915-919 Monadnock Bldg.

Market and Third Streets.

San Francisco, July 14th, 1910.

Standard American Dredging Co.,

Merchants Exchange Bldg., City.

Gentlemen:—

I wish to inform you that I have just received a telephone message from Richmond that those engines which you put on the wharf at Richmond are just about to slip off into the water because of their having been placed on the very edge of the wharf.

Without loss of time I notified your office of the above mentioned condition.

As these engines have not been turned over to us or *excepted* by us and we have no right to accept them outside of the machine, I in a friendly spirit notify you *you* of this condition.

Yours very truly,

RICHMOND DREDGING COMPANY.

H. W. WERNSE, Sec.” [658]

Q. Mr. Perry, I hand you a carbon copy of a letter dated January 5th, 1911, and ask you whether or not you sent the original to the Richmond Dredging Company? **A.** Yes, sir.

Mr. LILLICK.—We offer this letter in evidence and ask that it be marked Claimant's Exhibit No. 13.

(The letter is marked “Claimant's Exhibit No. 13” and is as follows:)

[Claimant's Exhibit No. 13.]

"STANDARD AMERICAN DREDGING CO.
Contractors for Dredging, Harbor Improvements
and Canal Work.

706-712 Merchants Exchange,

San Francisco, January 5, 1911.

Richmond Dredging Company,

915-919 Monadnock Building, San Francisco.

Dear Sirs:

You are hereby notified that this company is now ready and willing to return to you dredger 'Richmond No. 1'; that in order to enable us to return said dredger to you in as good order and condition as the same was received by us, it will be necessary for us to have the engines belonging to said dredger, which engines are now in your possession.

On receipt of this letter will you please give us such order, or make such other arrangements as may be necessary, promptly to enable us to obtain the possession of said engines? We will send for them at such time within reason as may be most convenient to you, and immediately upon receipt of said engines, we will restore them to the said dredger 'Richmond No. 1,' and put said dredger in as good order and condition as the same was when received by you, and return the said dredger to you—all without expense to you or any unnecessary delay.

Yours truly,

STANDARD AMERICAN DREDGING CO.,

By R. A. PERRY,

President." [659]

(Deposition of R. A. Perry.)

Q. I hand you a letter dated January 6th, 1911, which purports to be signed "Richmond Dredging Company, H. W. Wernse, Sec." written on the letter-head of the Richmond Dredging Company, and ask you whether or not you received that letter (handing)? A. Yes, sir.

Mr. LILLICK.—Will you admit having sent this letter, Mr. Taugher?

Mr. TAUGHER.—Yes.

Mr. LILLICK.—We offer the letter in evidence, and ask that it be marked Claimant's Exhibit No. 14.

(The letter is marked "Claimant's Exhibit No. 14" and is as follows:)

[Claimant's Exhibit No. 14.]

San Francisco, Jan. 6th, 1911.

Standard American Dredging Company,
706-712 Merchants Exchange Bldg.,
San Francisco, Cal.

Gentlemen:

Your letter of January 5th, 1911, is received and contents noted.

The Richmond Dredging Company hereby notifies you that it has not now in its possession and never had in its possession, the engines belonging to Dredger 'Richmond No. 1' since possession of the said Dredger with its engines aboard was delivered to you under the terms of the charter party therefor, dated February 10th, 1909. You have not at any time informed this Company that you had removed or intended to remove from the Dredger

'Richmond No. 1' the engines belonging thereto and no definite or positive information has ever come to us that you had removed same.

Richmond Dredging Company can positively inform you that it has not now and never did have in its possession any engines [660] removed by you from the Dredger 'Richmond No. 1.' We are informed and believe that there are at this time some engines on the property of the Point Richmond Canal and Land Company which engines we understand were caused to be placed on said property by the Standard American Dredging Company. We are permitted to inform you that the Point Richmond Canal and Land Company is entirely willing that you should remove those engines from its property at any time you wish and will give you free access to its property for that purpose at any time you notify the Point Richmond Canal and Land Company or Richmond Dredging Company that you desire so to do.

You are hereby notified that the Richmond Dredging Company is willing, with the permission of the United States District Court for the Northern District of California to take possession of Dredger 'Richmond No. 1,' equipped as she was when she was released from the custody of the United States Marshal for the Northern District of California by order of the said Court on the 13th day of September, 1910, on your application to said Court for such order and was delivered into your possession, and for the return of which Dredger a bond was executed and filed in said Court in the sum of Forty Thousand

(\$40,000.00) Dollars, conditioned among other things, 'that the Standard American Dredging Company return the said Dredger in the condition it then was and in good repair and pay all damages that should be sustained by reason of the detention of said Dredger, and Richmond Dredging Company's willingness to receive said Dredger is on condition that the said Bond be held to be in full force and virtue until all damages that Richmond Dredging Company have sustained and may hereafter sustain shall have been assessed and fixed by said Court and the amount thereof paid to Richmond Dredging Company. 4

Yours truly,

RICHMOND DREDGING COMPANY.

H. W. WERNSE, Sec." [661]

Mr. LILLICK.—We offer the letter dated February 13th, 1911, addressed to the Richmond Dredging Company and signed "Standard American Dredging Company by R. A. Perry, President," produced by the libelants at our request, we not having a carbon copy of the same present at this hearing, and ask that it be copied into the record as Claimant's Exhibit No. 15.

(The letter is marked "Claimant's Exhibit No. 15" and is as follows:)

[Claimant's Exhibit No. 15.]

“STANDARD AMERICAN DREDGING CO.

**Contractors for Dredging, Harbor Improvements
and Canal Work.**

706-712 Merchants Exchange.

San Francisco, Cal., February 3, 1911.

Richmond Dredging Company,

**915-919 Monadnock Building, San Francisco,
California.**

Gentlemen:

You are hereby notified that having complied with all of the terms and conditions of the charter party and agreement under which the Standard American Dredging Company chartered and now holds, the dredger ‘Richmond No. 1,’ we are ready to deliver the said dredger to you at any reasonable time and place that you desire in the canal at Richmond, as in said charter-party provided.

Said dredger is in good working order and condition, and in as good condition and repair as the same was at the date of said charter party, reasonable wear and tear excepted, and is in condition immediately to start work.

Unless you shall in the meantime particularly specify the time and place for the delivery of said dredger to you, we shall tender the same to you at Richmond, California, in said canal at Richmond, on the third day of February, 1911, at the hour of twelve o’clock Noon, and will then and there deliver the said dredger to anyone who may be designated [662] by you as authorized to receive and receipt

(Deposition of R. A. Perry.)

for it. If the said dredger be not received by you at the time of said tender, we shall hold it subject to your order, and at your risk, and charge you proper compensation for the care thereof, or will make such other disposition thereof as we may be advised is lawful and proper in the premises.

Yours truly,

STANDARD AMERICAN DREDGING
COMPANY,

By R. A. PERRY, President."

Mr. TAUGHER.—It is understood that I reserve all rights to object to the materiality or introduction of this letter in evidence.

Mr. LILLICK.—I hand you, Mr. Perry, what is apparently a carbon copy of a letter dated February 6th, 1911, addressed to the Richmond Dredging Company, and signed by you as President and ask you whether or not you sent the original of that letter to the Richmond Dredging Company (handing)?

A. Yes, sir.

Mr. LILLICK.—I offer this letter in evidence, and ask that it be marked Claimant's Exhibit No. 16.

(The letter is marked "Claimant's Exhibit No. 16" and is as follows:)

[Claimant's Exhibit No. 16.]

"San Francisco, California, February 6, 1911.
Richmond Dredging Company,
915-919 Monadnock Building,
San Francisco, California.

Dear Sirs:

In accordance with our letter to you of February

(Deposition of R. A. Perry.)

3, 1911, the dredger 'Richmond No. 1' is, and ever since said February 3rd, 1911, has been at Richmond, in the canal at [663] Richmond, in charge of competent men, employed by us at a daily cost of \$8, subject to your order, and at your risk. As stated in our former letter, we are prepared to deliver said dredger to you, or to anyone who may be designated by you as authorized to receive and receipt for it, and will have said dredger to any reasonable place in said canal at Richmond that shall be designated by you.

But we do not agree to retain said dredger in said canal at Richmond for more than forty-eight hours after service upon you of this notice; and unless you shall receive said dredger from us within said time, we shall make such other disposition thereof as we may be advised is lawful and proper in the premises.

STANDARD AMERICAN DREDGING
COMPANY,

By R. A. PERRY,
President."

Q. Do you know whether or not the Richmond Dredging Company ever accepted the dredger after you offered it in those two letters?

A. They never notified me that they had accepted it.

Q. Mr. Perry, in installing the two engines which you did on the "Richmond No. 1," after having removed the engines which were originally on the dredger, did you have any intention of having them for the dredger for any other than temporary use?

(Deposition of R. A. Perry.)

Mr. TAUGHER.—I object to the question as leading and suggestive. A. No, sir.

Mr. LILLICK.—Q. Mr. Perry, in installing the two gas engines which you placed on the dredger “Richmond No. 1” after removing the engines which were originally on the dredger, what object, if any, did you have in placing them on the dredger “Richmond No. 1” as to their use? [664]

Mr. TAUGHER.—I object to the question upon the ground that it is leading and suggestive.

A. The reason for installing these engines on “Richmond No. 1” at the time they were installed was for the purpose of providing sufficient power which was at least two times as much as the “Richmond’s” engines could furnish, for the reason that we had a particular piece of work to do, that is, making a railroad embankment at Walnut Grove, which embankment was required to be brought over to an elevation of from 20 to 30 feet above the water level. The length of the pipe-line was about 3,000 feet at times. The material to be handled was quartz sand, very heavy, and difficult of transportation by pipe-line method. It was necessary to create a very high speed of the water in the pipe-line in order to transport this material, due to the specific gravity of the sand, the high lift, and the length of the pipe-line.

Mr. LILLICK.—Q. When you placed the two engines on the dredger and removed the other two, what was your intention as to installing them on the dredger?

Mr. TAUGHER.—I object to the question as lead-

(Deposition of R. A. Perry.)

ing and suggestive, and calling for the conclusion of the witness, and asking for a fact to be found by the Court.

A. My intention of installing these engines was for the purpose of providing sufficient power to do the work at Walnut Grove then under contract.

Mr. LILLICK.—Q. What was your intention as to a removal of the engines subsequently, or as to leaving them on the dredger?

Mr. TAUGHER.—I object to the question on the ground that it is leading and suggestive, calling for the opinion and [665] conclusion of the witness, and for a fact to be determined by the Court.

A. The only intention that I had was to remove the engines on the completion of the work which they were installed for, as it was special work, and that was all the work we expected to do with the dredge as far as we knew at that time which would require that power, and we only chartered the engines for this specific piece of work.

Mr. LILLICK.—Q. Mr. Perry, when you put those two engines on board, had you any intention of keeping them on board of the dredger after you finished this particular job?

Mr. TAUGHER.—Objected to as leading and suggestive, calling for the opinion and conclusion of the witness, and asking for a fact to be found and determined by the Court.

A. We expected to remove the engines.

Mr. LILLICK.—Q. When you placed these engines on board of the dredger, Mr. Perry, had you in

(Deposition of R. A. Perry.)

mind at the time, or did you intend at that time to place them on the dredger in the way of repairs to the dredger?

Mr. TAUGHER.—I object to the question as leading and suggestive, calling for the opinion and conclusion of the witness, and that the question calls for a conclusion that can be found only by the Court.

A. No, sir.

Mr. LILLICK.—Q. Will you state in your own language, Mr. Perry, for what reason you placed the two engines on the dredge and removed the other engines from it?

Mr. TAUGHER.—I object to the question as calling for the opinion and conclusion of the witness and as suggestive.

A. My purpose for placing the two engines mentioned on the dredge— [666]

Mr. TAUGHER.—Q. When you say “you” you mean the claimant I suppose, Mr. Lillick?

Mr. LILLICK.—Yes.

Mr. TAUGHER.—You mean the Standard American Dredging Company.

Mr. LILLICK.—Yes.

A. (Contg.) Our purpose of placing the two engines on the dredge was to provide sufficient power to deliver the material on the fill, and at Walnut Grove being a specially difficult piece of filling to do, on account of the high elevation, specific gravity of material and length of pipe-line; the purpose of removing “Richmond No. 1” engines were for the reason that it would be more convenient to install

(Deposition of R. A. Perry.)

the engines which we placed on the dredge, that is to say, it made more space. We could have installed our engine at another point and left the Richmond Dredge Company's engines in their own place, but we decided to make it as convenient as practicable for installing our own engines, and that is the reason why we removed the Richmond Company's engines.

Q. By speaking of your own engines, you mean to be understood as saying that these engines belonged to you?

A. I mean to state the engines that we chartered for use on the Richmond Dredging Company's dredger No. 1.

Q. What, if anything, did you intend to do with those engines that you installed on the Richmond dredger No. 1 after you had completed the fill at Walnut Grove?

Mr. TAUGHER.—I object to that as leading and suggestive.

A. We intended to remove the engines and return them to the parties from whom we chartered the engines.

Mr. LILLICK.—Q. What did you do with those engines after you had made the fill at Walnut Grove? [667]

A. We removed the engines and returned them to the parties whom we chartered the engines from.

Cross-examination.

Mr. TAUGHER.—Q. Mr. Perry, you say you have had 20 years' experience in the dredge business?

(Deposition of R. A. Perry.)

A. Yes, sir.

Q. How many dredgers is the Standard American Dredging Company operating at present?

A. 7 or 8. Seven, I think, now. Do you mean how many are running?

Q. How many have they?

A. They have got 7. Sometimes I charter a dredger or two besides. When you ask me how many they are operating, that means one thing, and how many they own is another.

Q. How many dredgers does the Standard American Dredging Company own, Mr. Perry?

A. At this time the Standard American Dredging Company owns 6.

Q. How many did it own in September, 1910?

A. You want to know how many they owned in September, 1910?

Q. Yes. A. 5.

Q. 5? A. No, sir; 4.

Q. How many dredgers did the Standard American Dredging Company control in addition to that number through itself or through any of its subsidiary companies or allied companies?

Mr. LILLICK.—What do you mean by “control,” Mr. Taugher?

Mr. TAUGHER.—Controlled the use of those dredgers. A. At this time?

Q. In September, 1910. I am just confining myself to September, 1910, any time during that month?

A. Read the question, Mr. Reporter. (The Re-

(Deposition of R. A. Perry.)

porter reads the question.) We were in a position to charter from the other companies any dredgers that they were not employing.

Q. The number I am asking for, Mr. Perry.
[668]

A. That would be 6.

Q. 6 in addition to the four that they owned?

A. Yes, sir—no, making 6, all told.

Q. Making 6, all told? A. At that time, yes.

Q. You are the president of the Standard American Dredging Company? A. Yes, sir.

Q. The largest stockholder?

A. Yes, sir; I have got more stock than anyone else.

Q. What is that capitalized at, Mr. Perry?

A. \$1,000,000.

Q. How much of the stock do you own?

Mr. LILLICK.—I am sorry I cannot object to this as immaterial.

Mr. TAUGHER.—I think it is very material. It will help later on. I am not asking for curiosity.

Q. I want to know the number that you own legally and beneficially?

A. You want to know how many shares of stock I own par value?

Q. Yes, that the Standard American Dredging Company own. I do not mind telling you the object of asking that. It is for the purpose of showing that you are the man that controls the company; that is my object in asking those questions. The reason for that will appear later.

(Deposition of R. A. Perry.)

A. The amount of issued stock that I own in the Standard American Dredging Company is approximately—that is, the amount of issued stock at par value that I own is \$37,000 worth.

Q. \$37,000 worth? A. Yes, sir.

Q. How much is issued? A. \$50,000.

Q. That is, you own thirty-seven fiftieths of the whole of the issued capital stock of the company?

A. In the way I put it, about 75 per cent. [669]

Q. There is \$50,000 worth issued? A. Yes, sir.

Q. And you own \$37,000 worth of it?

A. 75 per cent is thirty-seven fiftieths.

Q. Of the issued stock?

A. Yes, sir, of the issued stock.

Q. Who are the officers of the Standard American Dredging Company?

A. R. A. Perry, president.

Q. That is yourself?

A. Yes, sir. C. Cummins, vice-president.

Q. Of San Francisco?

A. Sometimes; he is away a great deal. W. H. Connor, secretary, and W. L. Paulson, assistant secretary. That is about all the officers.

Q. How much of the issued stock of the Standard American Dredging Company does Connor own?

Mr. LILLICK.—Q. Do you know, Mr. Perry?

A. I don't know exactly. I know the rest of us divided it up. I could not tell you exactly the amount that each one of those fellows owns, correctly.

Mr. TAUGHER.—Q. How many other stock-

(Deposition of R. A. Perry.)

holders are there, besides the officers of the company?

A. There are not any.

Q. None? A. No, sir.

Q. Connor, Cummins and Paulson own 25 per cent between them of the issued capital stock?

A. I was not quite correct about that statement. There are three other stockholders that have small holdings, but not officers. I forgot about that.

Q. How much do those other three own?

A. As near as I remember, about \$6,000 worth at par.

Q. \$6,000? A. Yes, sir.

Q. There is only 7/50ths of the issued capital stock divided between the other officers of the company?

A. Yes, sir, about that. I can get it from the record and tell you exactly. [670]

Q. This afternoon you may do that. Who are the officers of the California Reclamation Company?

A. Cummins is vice-president.

Q. Give us his initials?

A. C. Cummins; the same man. Connor is secretary and treasurer, I think.

Q. What is his name? A. W. H.

Q. He is secretary and treasurer?

A. Yes, sir; I think he holds both offices.

Q. Who is the president of the California Reclamation Company? A. R. A. Perry.

Q. You are the president of the California Reclamation Company? A. Yes, sir.

Q. What is the capitalization of that company?

A. \$75,000.

(Deposition of R. A. Perry.)

Q. How much of that stock is issued?

A. About \$60,000.

Q. How much of that stock do you own?

A. One share.

Q. How much does the Standard American Dredging Company own? A. None.

Q. Who owns the balance of it?

A. It is held by different owners. I would not like to tell you that because I cannot tell you correctly.

Q. What business is the California Reclamation Company engaged in?

A. In building the levees; a clam-shell business; building levees up the Sacramento River, reclamation work.

Q. Does your wife or any member of your family own stock in the California Reclamation Company?

A. I think not more than \$2,000 worth.

Q. None of your relatives own more than \$2,000 worth? A. I think not; something like that.

Q. Are the balance of the stockholders your personal friends?

A. No, sir. I go into deals with them and they do with me sometimes; but not personal friends. [671]

Q. What work was the California Reclamation Company doing in September, 1910?

A. Working for the Southern Pacific Railroad Company building a railroad embankment by clam-shell dredge back of Walnut Grove.

Q. Part of the same job that you did with the same suction dredger?

(Deposition of R. A. Perry.)

A. Part of the same railroad construction but not the same classification of work as the clam-shell dredger picked the material up from the cut and delivered it directly on the fill by means of the long boom and clam-shell bucket.

Q. Who owns the dredger "Oakland"?

A. The Standard American Dredging Company.

Q. They owned it during all the time mentioned in that charter-party, February 26th, 1910?

A. Yes, sir.

Q. The "Oakland" is one of the largest dredgers on the coast, is it not?

A. I think she classes among the heavier dredgers on the coast.

Q. Is there any dredger on the coast of any greater capacity than the "Oakland"?

A. I think so, in hard material.

Q. In soft material?

A. I think the "Oakland" would be able to pump in mud as much as any hydraulic dredger on the coast.

Q. Are you familiar with the work done by the Richmond Dredging Company with the dredger "Oakland" at Richmond during the year 1910?

A. I know about where they were working; I never was over there more than once.

Q. You had your engineers make report of the kind of material to be dredged over there, and all the data needed for the purpose of taking a contract to do contract work, did you not?

A. When? [672]

(Deposition of R. A. Perry.)

Q. During 1910 and 1911?

A. I think not during 1910. I think we made a survey along in the spring of 1911, as we were negotiating then with a view to do some work at Richmond.

Q. Could you tell me what the capacity of the "Oakland" would be in that material discharging the material 2,000 feet from the point of dredging, and not dredging deeper than 20 feet?

A. That material varies a good deal; it depends upon where a dredge may be required to excavate. There is a great difference in the classification of material there.

Q. Can you give us an idea of her capacity in that material per hour? A. In what material?

Q. At Richmond.

A. In what location? You can do twice as much in some places as at another.

Q. In the soft mud at the mouth of the canal at Richmond.

A. You mean to say that the dredger would not be required to dredge any material that was hard?

Q. Yes, that is it; just the soft material.

A. And not required to deliver it more than 2,000 feet, or elevate it more than 10 feet?

Q. Yes.

A. If I were taking a contract to do the work, I would estimate we would be able to do not less than 400 cubic yards per hour of soft mud, and deliver it 2,000 feet and elevate it 10 feet high.

Q. What would you say the average upkeep per

(Deposition of R. A. Perry.)

day of the "Oakland" would be in that kind of material at Richmond?

A. I could not give you a segregated cost of the average upkeep per day as I have not got it in mind.

Q. You could not say what the upkeep on that kind of a job would be?

A. I would not like to say, as I do not think I would get it very correct.

(A recess was here taken until 1:30 P. M.) [673]

AFTERNOON SESSION.

R. A. PERRY, cross-examination resumed.

Mr. TAUGHER.—Q. What repairs would you say would come in on the dredger "Oakland" under the term "ordinary repairs" outside of wear and tear that you would expect them to make under the covenants in that charter-party of February 26th, 1910?

A. I would expect the dredge to be in condition to operate efficiently upon the return of same, whatever these repairs might be.

Q. That charter-party of February 26th, 1910, is as follows: "The party of the second part"—that is, the Richmond Dredging Company—also agrees that during the term of this agreement, it "will pay all charges for labor, electric current, supplies, repairs, and all other expenses of any kind and character whatsoever in and about the operation of the said dredger 'Oakland'; and also hold the said dredger 'Oakland' and the party of the first part, harmless from any debts that accrue from any of the expenses aforesaid, or from any act or omission of the party

(Deposition of R. A. Perry.)
of the second part.”

What repairs do you think that covenant contemplated, or what repairs do you think were in the contemplation of the parties when that covenant was made?

A. I think the contract speaks for itself as to that.

Q. Yes, it speaks for itself, if we know what that word “repairs” means. If you will tell me what the word “repairs” in that covenant will include I will be enlightened.

A. I think the word “repairs” means any repairs that were necessary to be made to have the dredge in as good condition as when received. [674]

Q. That is what you expected to be done in relation to the “Oakland,” and is that what you expected you were called on to do in relation to “Richmond No. 1”?

A. You are asking me what “repairs” means under this charter-party, and I am telling you what my opinion is as regards the particular charter-party which you set forth of the 26th of February, 1910.

Q. Tell us what you think is covered by that word “repairs.” A. I consider the contract to mean—

Q. (Intg.) What is covered by the word “repairs”; what is included or contemplated by that word “repairs” in that charter-party?

A. You cannot pick out one word in a contract and say what that means.

Q. We are just talking of “repairs” and nothing else in this contract.

A. I have told you previously, in the question

(Deposition of R. A. Perry.)

which I answered above, that anything that was necessary to put the dredge in the same condition as when the Richmond Dredging Company received it would be a compliance with the contract under "repairs."

Q. Suppose the cables on that dredger became worn and practically useless, how would they be repaired?

A. What cables do you refer to? There are several kinds of cables on an electric dredge.

Q. Swinging cables.

A. That is, the cables for swinging the dredge from side to side, you mean?

Q. Yes.

A. The swinging cables, if they were worn out beyond being able to be used for the purpose intended in an efficient manner, would be required to be renewed. [675]

Q. Would you consider that if new cables were put on by the Richmond Dredging Company they would belong to you—that they would belong to the owner of the dredger?

A. The only thing that I—

Q. (Intg.) Just answer the question.

Mr. LILLICK.—Q. And then go on and explain, if you want to.

A. What you mean to ask is, as I understand it, that if the Richmond Dredging Company replaced the worn out cables which they wore out, would the Standard Dredging Company expect that said replaced cables would belong to the Standard American

(Deposition of R. A. Perry.)

Company's dredge?

Mr. TAUGHER.—Q. Yes.

A. My opinion is that they would belong to the dredge, as the dredge was equipped with such cables in as good condition when the Richmond Dredging Company received it, therefore, in order to return the dredge in the same condition as when received, it would be necessary to supply any part, or make any repairs, or do any other thing necessary to comply with the charter-party.

Q. If the cable became so worn, Mr. Perry, that it was practically useless, and the Richmond Dredging Company had replaced that cable by a new one, and set aside the old cable which was so worn that it was practically useless, and after finishing the term of their charter, do you think that they would have a right to take off the new cable that they put on and put back the old and discarded cable?

A. As I have answered it before—

Q. (Intg.) Just answer that now.

A. They would have a right to put the cable back if they wanted to; but before I would accept the dredge as being in the same condition as received, I would want them to comply with the charter-party.

[676]

Q. Would you think that you would have a right to claim the new cable that was put on that dredger in place of the one that was practically worn out and useless?

A. I would not claim any particular cable. I would simply claim that the dredger should be put

(Deposition of R. A. Perry.)

back as provided for in the charter-party.

Q. If a new pump was put on that dredger "Oakland" because the pump that was on the dredger had become practically useless, or was in such a condition that it could not profitably be worked but would still do some pumping, and the Richmond Dredging Company put on a new pump, retaining the old and practically worn-out pump, would they have a right do you think, to put back the old worn-out pump and remove the new pump which they had put in its place?

A. I would answer that question the same as I answered the other one, they could put back whatever they liked, but I would not accept that dredger only in accordance with the terms of the charter-party being complied with; that is, I would not accept the return of the dredge unless it was in the same condition as when received by the Richmond Dredging Company, less ordinary wear and tear.

Q. Suppose during the course of the charter reasonable wear and tear had caused the pump, or the cable, to become practically useless, and they had then replaced those old worn-out parts, pump and cable, with new pump and new cable, and then attempted to put back the worn and discarded one, when turning over the dredger, would you consider, under this charter-party, that you were the owner of the new pump or new cable, or would we have a right to take off the new pump and new cable we put on, and [677] put back the worn out predecessors of those parts?

(Deposition of R. A. Perry.)

A. I wish to say that the centrifugal pumps—

Q. (Intg.) Answer that question.

Mr. LILLICK.—Q. Go ahead, Mr. Perry; you have a right to answer it in any way you like.

A. That is the way I am going to do, so that you will understand it.

Mr. TAUGHER.—Q. Pray do not explain for my explanation.

Mr. LILLICK.—You may answer just as you please, Mr. Perry.

A. I wish to set forth that the centrifugal pumps, two in number, on the dredge "Oakland," were specially designed, and fitted with liners, the circumferential liner being of rolled steel, the side liners being of cast iron or cast steel, these liners being for the purpose of preventing wear of the pump shell. It is the practice in our company to keep on hand spare liners for these centrifugal dredging pumps, so that as the liners become worn, and before they are worn through so as to permit the material being discharged through the pump, from coming in contact with the shell and thereby wearing out the shell or casing, that the liners be renewed. In this way, and if the liners are renewed, as and when required, there is no occasion for wearing out the pump shell. I wish to state that the dredge "Richmond's" centrifugal dredge pump as received by us was not provided with liners to protect the casing of the pump shell, therefore there was no way to prevent the wearing out of the pump shell.

Q. Read my question again, Mr. Reporter, and I

(Deposition of R. A. Perry.)

will ask Mr. Perry once more if he is going to answer my question. His explanation may be interesting, but it is not to me. I should like you, Mr. Perry, to answer my questions. [678]

(The Reporter reads the question.)

A. I don't think we would have any claim on a pump that you had removed or had used on the dredger. All the claim I think we would have would be to ask you to return the dredge to us as provided in the charter-party. Furthermore, if the liners in our particular place which I have explained were taken care of, there would be no occasion, through ordinary wear and tear, or any other reason for wearing out the pump casing for the reason that the liners would protect it, if renewed when required.

Q. Supposing that the cutter knives had become so worn that they were not profitable, and we put on new knives, would you consider we had a right to take them off and put back the worn-out knives when turning over the dredger to you?

A. If you saw fit to do so, I could not object.

Q. Supposing that the cutter gear had become worn through reasonable wear and tear, or had broken in the ordinary operation of the dredger, do you think we would be called upon to put on new parts in place of the parts that had been broken by the reasonable wear and tear of the dredger?

A. I think the only thing I would look to at all would be to return the dredge as provided for under the charter-party.

Q. Well, if reasonable wear and tear had caused

(Deposition of R. A. Perry.)

the breaking of the cutter gear, or had caused the cutter gear to become practically useless, and a new cutter gear was put on, would you consider that we had a right to take off the new cutter gear when we finished the using of the dredger, and put back the worn out and discarded parts that had been replaced by new ones?

A. I should consider you would have a right to do anything you had a mind to, provided you returned the dredger to the Standard American Dredging Company in the same order and condition as provided for in the charter-party. [679]

Q. What would you consider came under the definition of reasonable wear and tear? How long would you say that cables would last on the dredger "Oakland" with ordinary usage in the job at Richmond?

A. I have no good judgment about how long a cable would last at Richmond, but answering your question further as to the life of a cable, it depends where the cable is worked. For instance, if it was a swinging wire cable—

Q. (Intg.) We are talking about a swinging wire cable.

A. If you mentioned that, I would not have to bother. There are several cables of which the swinging wire cable usually wears out much faster than the others.

Q. We are talking about those. They have been designated earlier in the question.

A. As to the life of a swinging wire cable, in my

(Deposition of R. A. Perry.)

opinion, this is very hard to determine, for the reason that some conditions due to the nature of the material being excavated, a much greater strain is put on the swinging wire cable than where easy material is dredged. Then again there are times when the swinging wire cable is caught in the cutter or some other accident happens or a piece of bad wire that sometimes does not last two days after it is put on; then again it might last ten days, or longer. I could show you many reports where a swinging cable, an inch and an eighth in diameter, was not in service more than three or four days; when digging in hard material we would heave them right in two; therefore it is hard to state what the life of a swinging cable is.

Q. Supposing that a dredger returned to you after three months' work with her swinging cables absolutely worn out and not on there, would you consider that reasonable wear and tear had caused those cables to become worthless? [680]

A. I could not answer that question put in that way, because I suppose you are assuming that the cables were furnished with the dredge, that you have in mind, where or when chartered.

Q. Yes; that she was fully equipped with cables when she was chartered, and they were all worn out at the end of three months, would you consider that reasonable wear and tear would cover the damage to the cables?

A. I would consider that if the charter-party provided for the dredge to be returned in good condi-

(Deposition of R. A. Perry.)

tion, less ordinary wear and tear, and she was not in that condition, I would demand that she be put in that condition.

Q. I want to get some idea as to what you consider reasonable wear and tear, because it is a very important element in this case, and you refuse to answer any questions as they are put to you except you make long explanations and various other things that you think may affect the answer. If you answered the questions a little more directly, we would save a lot of time. Would you consider that cables on a dredger used for three months and worn out would be covered by the covenants in this charter-party of reasonable wear and tear?

A. I would have to repeat, if the dredge was not returned in accordance with the charter-party, I should have to insist on its being returned in the same manner.

Q. That is, you would insist on the cables on the dredger being returned?

A. They would have to be in condition to use.

Q. With new ones put on the dredger?

A. Not necessarily new ones; no. I would want the dredge returned in as good condition as when I turned it over to you. As long as she would work successfully in the same manner that she did when I got her, that would be all that the charter-party provided for. [681]

Q. Suppose that the cable had worn out by reasonable wear and tear, and then a new cable was put on a week before we finished using the dredger "Oakland," and when we came to return the dredger to

(Deposition of R. A. Perry.)

you we took off the new cable and put back the one that was worn out, would you consider that we had the right to take off the cable that we put on there? Remember the first cable was worn out by reasonable wear and tear.

A. I would consider you would have a right to take it off if you wanted to.

Q. Would you accept the dredger in that condition?

A. I would accept it in accordance with the charter-party.

Q. I am asking for one specification in relation to that. You can answer it very easily if you want to.

A. I would accept the dredger as a whole and take it as a whole if it was turned over in as good condition as when I chartered it. That would be acceptable to me.

Q. Answer that one question. If the pump had worn out by reasonable wear and tear, and the cables had worn out by reasonable use, and the suction pipe had worn out by reasonable use, and we replaced those parts to finish our contract, would you consider that we had a right to take off the new parts that we put on and return the dredger with the worn-out and useless parts? Remember that the worn-out and useless parts were worn out by reasonable usage of the dredger. You can answer that question if you want to.

A. You are referring to the dredger "Oakland" chartered from the Standard American Dredging Company.

(Deposition of R. A. Perry.)

Q. I am speaking of the "Oakland." It is under the same charter-party as ours is to you. [682]

A. I have heretofore advised you that the pumps on the dredger "Oakland" cannot be worn out by reasonable wear and tear, as they are provided with liners which are supposed to be renewed as and when required in order to protect the pump casing.

Q. Go on. A. That is all.

Q. That is the only answer you will make to that question?

A. I was going to make more, but I thought you were going to interrupt me.

Q. Would you accept the dredge in that condition?

A. I would accept the dredger as provided for in the charter-party.

Q. Supposing reasonable usage had caused the cutter gear to become absolutely useless, and we had put on new cutter gear, and just before we returned the dredger to you we removed the new cutter gear we had put on and attempted to turn back the dredger, with the old worn-out cutter gear, would you accept the dredger, or rather, would you consider that we had a right to return the dredger in such a condition under this charter-party?

A. I would assume you would have a right to return the dredger and I would expect the return of the dredger in as good condition as received, according to the terms of the charter-party; I would not care what you did or how you did it; that is what I would expect when I got the dredger back, as long as the dredger was in the condition provided for un-

(Deposition of R. A. Perry.)

der the charter-party.

Q. I would like to know, Mr. Perry, if you refuse to answer that question in any other way than that?

Mr. LILLICK.—He has answered it. You can continue to ask him the questions until he satisfies you that he will not answer it in any other way; then you can go on with something else. [683]

Mr. TAUGHER.—I am not asking you when I shall go on with something else.

Mr. LILLICK.—I do not expect you will take suggestions from me. I will instruct Mr. Perry to answer the question and do the best to give you a lucid answer.

Mr. TAUGHER.—That is all I want.

Mr. LILLICK.—He has answered it and answered it very fairly.

Mr. TAUGHER.—Q. Would you consider we were complying with our covenant in that charter-party of February 26th, Mr. Perry, if the cutter gear and the pump and the cables on the "Oakland" had become worn by reasonable usage, and we had replaced those parts with new parts for our convenience to finish our contract, and then just before we returned the dredger to you we took off those parts that we had put on and put back the worn and discarded ones?

A. Will you read that question to me, Mr. Reporter? (The Reporter reads the question.) I would rely entirely on the provisions of the charter-party as to what the condition of the dredge was to be when returned.

(Deposition of R. A. Perry.)

Q. I am endeavoring to discover what this charter-party means, what you consider we were bound to do, and what you consider you were bound to do. Do you refuse to answer that question, Mr. Perry?

Mr. LILLICK.—You can say no, Mr. Perry, and refuse to answer, or go ahead and answer.

A. No, I have not refused to answer the question.

Mr. TAUGHER.—Q. Read the question again, Mr. Reporter.

(The Reporter reads the question.)

A. Whatever the parts were that were worn, or whatever the damage was to the dredge scow, I should expect the Richmond Dredging Company to make good, and in sufficient condition to comply [684] with the terms of the charter-party.

Q. I will ask the reporter to read that question once more, Mr. Perry, and I will ask you again if you will answer the question?

(The Reporter reads the question.)

A. I will say again that the charter-party provides how the dredger is to be returned, and in what condition it is to be returned. The interpretation of this charter-party clearly states what this condition is, and it is the business of the Richmond Dredging Company to finally deliver the dredge in this condition before the Standard Dredging Company can be required to accept the dredge from the Richmond Dredging Company in the condition as when received; I think that answers your question all right.

Q. It does not touch it. I will ask the Reporter to read the question once more, and if you do not an-

(Deposition of R. A. Perry.)

swer the question we will have it certified to the Court to have it answered. You can read the charter-party over if you want to before you answer the question and advise yourself in any way that you please, and we will wait for you, but I want an answer to that question. Now read the question, Mr. Reporter.

(The Reporter reads the question.)

Mr. TAUGHER.—I will have you make a note, Mr. Reporter, that the proceedings were suspended long enough to read the charter-party before answering, and that he read the charter-party.

A. After reading the charter-party, I still believe that the charter-party provides that the dredge must be returned in as good order and condition as the same shall be at the beginning of the term of the charter-party, reasonable wear and tear therefor, and damage by fire only excepted. I think this is all [685] the answer that is required under the way that I view the question.

Q. The question particularly directs itself to whether or not such action on our part would be within your idea of what we were bound to do under that covenant. I am just asking for your idea, not what the law says.

A. My idea is entirely in accordance with whatever the charter-party says, and I would be bound by whatever the charter-party says.

Q. I am asking you for your opinion upon that, which I am entitled to have.

A. I have told you that is my opinion of it.

(Deposition of R. A. Perry.)

Q. Is your opinion that that would be a compliance with our covenant or not a compliance?

A. I would have to depend on the charter-party.

Q. You know the charter-party; you have just read it over. I am asking for your opinion; not what conclusion the Court may draw from it, but your opinion.

A. I am not a competent person to pass on the legality of the charter-party, but that is the way I read it.

Q. Did you have anything to do with the making of this charter-party?

A. Mr. Cummins and Mr. Connor made this charter-party with the assistance of our attorney.

Q. Do you know about the making of it?

A. I was not here; I was in Galveston at the time that this thing was made.

Q. How many charter-parties had your company made prior to the making of this charter-party? Have you any idea?

A. What do you mean? With other persons and incorporations?

Q. Yes. A. No, sir, I could not tell you. [686]

Q. A good many? A. Not very many; no.

Q. You refuse to answer that question in any other way than the ways you have answered it? You refuse to give us your opinion as to whether such action on our part would be proper under the terms of this charter-party?

A. I still state that I would depend on the construction of the charter-party as to what it means.

(Deposition of R. A. Perry.)

Q. In order to arrive at a construction of that charter-party, we want to discover what the parties to it thought it meant; that you refuse to state.

A. I still maintain that the charter-party answers that best for itself, as I am not able to determine the legal points. I do not understand those things and cannot interpret them properly, like an attorney would.

Q. When cutter knives become worn in a dredger and need repairing how is a dredger ordinarily repaired, with respect to such cutter knives?

A. The old cutter knives are removed and new ones bolted on.

Q. The old cutter knives are removed and new ones are bolted on? A. From the cutter cage.

Q. When cables become worn and need repairing on a dredger, how are those cables ordinarily repaired?

A. In some instances, if the cable is worn for only a reasonable distance, which is often the case, on account of its winding around a sheave, that portion that is badly worn, is cut out of the cable oftentimes and a new piece spliced in to the worn place; then again as the cable becomes worn in one spot after splicing the new part in, we turn the cable end for end and so as to make a new place not covered by the splice, if possible, for the cable to wind around the sheave, thereby lengthening the life of the cable repaired. [687]

Q. That is not repairing it, Mr. Perry; that is just the placing of it in a different position.

(Deposition of R. A. Perry.)

A. No, sir.

Q. I asked you as to the repair of it.

A. I am telling you sometimes we cut out a piece that is worn out.

Q. That part is all right; I understand.

A. In place of throwing away 1,000 feet, because the cable may be worn for a distance of possibly 75 or 100 feet, we cut out the worn portion and splice a new part into the 1,000 feet, thereby lengthening the life by this repair. In some cases, where this part wears on the sheave, as before stated, we turn the cable end for end, to get a new place to work on the sheave.

Q. In relation to the dredger "Richmond No. 1" did you ever repair any cables there by splicing them?

A. I could not tell you, because I am not on the dredger enough to know the detail of how the men take care of the little things around the dredger.

Q. Is that the ordinary way of repairing a cable, a worn cable?

A. That is one way. I will tell you another way. Another way is, quite often a strand is worn—some of the cables, by way of explanation, are made up of 6 and sometimes 8 strands; therefore, if a strand becomes cut, known as what we call the cable strand-ing, we sometimes take a new strand out of another piece of cable and splice and tuck this into the cable without cutting the entire cable in two, but just putting in a new strand which repairs the cable quite effectively at times and saves the necessity of buy-

(Deposition of R. A. Perry.)

ing an entire new cable.

Q. What is the most usual way of dealing with a worn cable on a dredger? [688]

A. I think the methods described, if it is within repair, is the most usual way to do it. I will add further, for your information, after a cable is worn so that we do not want to repair it for use as a swinging cable, which requires the longest cable on the dredge, and as before stated, the cable wears mostly within a hundred feet or so of its length, we then take the best parts of this cable and make pennants of it. What I mean by that is, we splice an eye in the cable, possibly in pieces of from two to four hundred feet, and shackle these parts together, which we can use the same as the new cable, as long as it is not required to pass through a sheave where the shackles are. Then again we use these portions of unworn cable for the spud wires, which are not required to be as long as the swinging cables.

Q. You are a peach of an explainer. When you take that cable off and put it to those various uses, what do you do for the swinging cable? How do you replace it?

A. We have a spare swinging cable that we use that has been repaired before and we use it while fixing this.

Q. When a cable becomes so worn that it is practically useless, what do you do with that cable then?

A. We generally work it on the port side of the dredge where the strain is not severe at all.

Q. When you remove it from the place where it

(Deposition of R. A. Perry.)

formerly occupied what do you put in place of the one that you take off ordinarily?

A. What you mean is, as I understand it, after we have consumed all our spare cables and require a new piece entirely for one of the swinging wires, if we have to buy a new one. [689]

Q. Heavens, I was afraid you were going to say that. When rubber connections become worn and need repairing, how is the dredger ordinarily repaired as to its rubber connections—the dredger or its equipment?

A. We usually have spare rubber connections on hand, and when a hole is worn in the rubber connection we use an old rubber connection and make patches and bolt these patches on to the outside of the connection so as to get additional life out of the connection. That is the method of repair of the connection, where the connection wears through the center. If the connection should have a hole through, or have a hole cut through next to the pipe, and if the connection is of sufficient length, we simply haul the connection on to the pipe an additional distance so as to permit of its further life and use.

Q. After it has become worn so that it does not pay to repair what do you do then?

A. When the connection is beyond repair we cut it up and use it for patches.

Q. Replace it with a new one?

A. If necessary. If we need more than we have got on hand in the pipe-line and require a greater

(Deposition of R. A. Perry.)

length of pipe-line.

Q. Do those connections last a long time or a short time?

A. Sometimes they last 6 or 8 hours; and sometimes they last 30 days; sometimes 60 days. It depends on conditions.

Q. How much did the connections cost for the dredger "Oakland"?

A. You can buy them anywhere from \$15 a linear foot up to \$25 a linear foot. It depends on the grade you wish to buy.

Q. How long are those connections for the "Oakland" ordinarily? [690] A. Different lengths.

Q. The kind ordinarily used.

A. We use usually about three lengths, so as to save all we can on connections; 18 inches in length, 24 inches in length, and 30 inches in length.

Q. What does a connection ordinarily cost you that you use on the "Oakland"?

A. I say from \$15.

Q. How much does each connection cost you ordinarily? A. I should have to figure that out.

Q. If you do not know, figure it out.

A. If one is 18 inches long—

Q. Never mind "if." Tell me if you know.

A. I am trying to tell you; I have to figure how much a foot it is, and multiply it by the price per foot of each one, if you want to know specifically. For example, a connection $1\frac{1}{2}$ feet in length at a cost of \$20 per foot would cost \$30 for that particular connection.

(Deposition of R. A. Perry.)

Q. What did the connections cost that the "Oakland" was equipped with at the time she was turned over to the Richmond Dredging Company on February 26th, 1910?

A. I could not tell you. I don't know it in my mind.

Q. Have you any idea what the most expensive connection would cost of those connections?

A. That is, a single connection?

Q. Yes.

A. I could not tell you because I don't know the lengths of them or the price of them; that is a matter of record.

Q. 30 inches. These were 30-inch connections.

A. I could not tell you if they were or not. If the connections [691] were 30 inches, or 2½ feet, and if they cost \$20 a foot, a single connection of this length and price would cost \$50.

Q. We understand that. There is no question about that. It would not need an expert to tell us that. What did they cost? How much did they cost a foot? A. I have told you.

Mr. LILLICK.—The witness says he does not know.

Mr. TAUGHER.—Q. Are you sure you ever bought for \$15 a foot any within the last year?

A. Yes, sir. I have got under contract now about 30 connections from a rubber company in town for shipment to Galveston at \$15 a foot.

Q. Connections large enough for the dredger "Oakland"?

(Deposition of R. A. Perry.)

A. Yes, sir; as I told you before, you can buy connections at most any price; it depends on the thickness of the rubber tube inside of the connection. In other words, if you should buy a connection with a one-eighth thickness in a rubber tube, it would be much cheaper than a connection having a three-eighths of an inch rubber tube. The rubber tube is the greatest expense about the connection, being nearly all gum.

Q. Have you any idea how thick the rubber tubes were on the connections that were delivered with the "Oakland" on February 26th, 1910? A. No, sir.

Q. No idea? A. No, sir.

Q. From \$20 a foot up to what price do good connections run suitable for the "Oakland"?

A. It depends on what pressure you are pumping against. In some [692] conditions we need over 45 pounds' pressure on the pipe-line. In some cases we only need 15 to 20 pounds.

Q. Speaking of the connections where the pressure was 45 pounds, what would proper connections for dredging under those conditions cost, suitable for the "Oakland"?

A. I think it would be economy to buy as good a connection as you could get, I presume the cost would be around \$28 a foot—\$26 to \$28 a foot under that case.

Q. Now, Mr. Perry, supposing that the motors on the "Oakland" had worn out or had become useless through reasonable wear and tear a week before we had finished with her, and we put on new motors to

(Deposition of R. A. Perry.)

finish that job; would you consider, under the terms of this charter-party of February 26th, 1910, we had a right to take off the new motor and put back the motor that had burned out?

A. I would still rely on the charter-party to determine how you were to deliver the dredge back to us.

Q. I am not asking for that. I am asking for your opinion.

A. It would depend on the charter-party, Mr. Taugher.

Q. You refuse to tell us what your opinion of that is, do you, Mr. Perry? Don't you think you could tell us more about what was meant by the terms of that charter-party than the Court could—that is, you could tell us more what was meant by the parties to it?

A. I think that the charter-party and the Court are the proper parties to determine what the charter-party says and means.

Q. Don't you think you could tell us more as to what the custom is among dredger men as to that kind of thing than the Court could?

A. If this case was not in court, I guess we would not be bothering much about charter-parties. [693]

Mr. LILLICK.—Q. Is it not a question of what reasonable wear and tear is in turning back the dredger under the charter-party?

A. I should think it might be.

Mr. TAUGHER.—Q. I will go to another phase of the matter, Mr. Perry, for a little while, and then

(Deposition of R. A. Perry.)

come back again to that. Can you tell us how you repaired the cables that become worn on "Richmond No. 1"? A. No, sir.

Q. Do you not know, as a matter of fact, that they were repaired by new ones being put in place of the ones that became worn?

A. No, sir. I am not conversant with the details of the repair of the dredger "Richmond" as I was here only a portion of the time; I am away a great portion of the time from San Francisco.

Q. Do you know whether or not new cables were put on the dredger "Richmond No. 1" by the Standard American Dredging Company?

A. I could not say.

Q. Do you know whether or not new cutter knives were put on the dredger "Richmond No. 1" while you had it under this charter-party of February 26th, 1910? A. I think there must have been.

Q. Do you know if various parts of the pump on the dredger "Richmond No. 1" were replaced by new parts?

A. I believe they were, as the cutter knives and the parts that are subject to wear on the sand are continually wearing out and have to be renewed at intervals sometimes of 30 days; sometimes in some cases the cutter knives will not last more than two weeks in hard sand.

Q. What is the life of swinging cables?

A. That is indefinite. [694]

Q. In hard heaving or cutting how long would you say that they would ordinarily last on the "Rich-

(Deposition of R. A. Perry.)

mond No. 1," we will say?

A. In very hard digging, in hard heaving, the cable might be broken in 10 or 12 hours. I have seen that to happen in many dredgers; sometimes it might last a week and sometimes a few weeks. The swinging cables are part of the machine that is continually wearing out. I could offer you reports showing where cables do not last at times, brand new ones, more than 10 hours, and again a week or two weeks before they let go, according to the conditions; after they break we repair them by splicing in new parts, as described heretofore in my answer.

Q. You do not use those repaired cables on the swinging cables? A. Quite often; yes.

Q. When they get beyond the point where you could profitably use those on the swinging cables, what do you do—replace them with new ones?

A. We continue to use those particular cables as long as there is anything to use of them, by using them as pennants and spuds and sometimes using them on the port side of the machine, which does not require much power to pull.

Q. What cable do you use on the ladder?

A. For hoisting the ladder?

Q. Yes.

A. We use a cable very often the same size as the swinging cable so as to carry only one size, if possible, on the machine.

Q. But when the swinging cable gets so that it is not profitable to repair it, what do you do for a swinging cable?

(Deposition of R. A. Perry.)

A. From time to time the same as the cutter knives, as the swinging [695] cable, cutter knives and pump-liners where they wear out rapidly, we have to renew them.

Q. What do you mean by renewing them?

A. We have to put a new one in and start over again.

Q. What part of the pump of the dredger "Richmond No. 1" was repaired while in your possession?

A. Many parts; all parts, I think.

Q. All parts. Would that mean a whole new pump?

A. All parts had been repaired several times.

Q. You do not mean that you put a new pump on it?

A. I will explain that a little more fully about the pump, as near as I can remember it. As before stated, this pump had no liners whatever in it when we chartered her. The first thing to wear out, as I remember it, were the side doors, which the sand wore holes through. These were renewed. Later on the casing which had no liners, known as the snail portion of the pump, wore holes through, and was repaired until it could be repaired no longer. Then a new snail was purchased and put in place of the old snail, using the side doors, so that finally all parts of the old pump which was received when we chartered the dredge was worn out and new parts put in from time to time until the whole amount of the old pump was entirely gone.

Q. What is a pump like that worth?

(Deposition of R. A. Perry.)

A. I could not tell you only on a guess, because I cannot remember all that stuff. I have too many dredge boats to remember the cost. I could give you a pretty fair guess at it.

Q. What is it?

A. It would be in the neighborhood of \$900, I think.

Q. What did you do with the old snail or shell of that pump? [696] A. I could not tell you.

Q. Did you not put it over in Richmond?

A. I could not say.

Q. In the same warehouse with the old engines?

A. I could not say.

Q. Why did you not put back that part when you were finished with it and take off the new pump that you put on? A. For what reason?

Q. Why did you not put back that part when you were finished with it and take off the new pump that you put on?

A. I expect the old part was destroyed entirely, due to the action of the sand wearing it out.

Q. Was the new pump worn badly when you got through with it?

A. I never saw it to know. I should not think it would be badly worn, as we installed liners in the side doors when we made new ones.

Q. That sand was hard to handle up there?

A. We installed the liners as before described on the doors of the new part so as to take care of the wear in future operations and not destroy the door castings themselves; they were frequently renewed,

(Deposition of R. A. Perry.)

I understand, while the dredge was at Walnut Grove.

Q. The sand was pretty hard on them there?

A. Sand is pretty hard anywhere for that on the pump. It cuts pretty badly; it is not like mud, you know.

Q. What repairs did you make on the suction pipe of the "Richmond"?

A. I believe that at different times a new suction pipe was installed. A suction pipe wears out probably once in six months when it is in the sand, when you are pumping sand. [697]

Q. Just answer the question; you have not answered it.

A. Please read it, Mr. Reporter.

(The Reporter reads the question and answer.)

Q. That is not what you mean to say, is it?

A. Yes, sir, that is correct; it goes from the ladder up to the pump.

Q. Did you do that more than once?

A. Yes, sir; I am sure we did. I know that we did more than once; that wears out. One will not run over six months in sand.

Q. What is the suction pipe worth for the dredger "Richmond"?

A. A quarter-inch pipe, 12 inches diameter, should be worth \$1.75 to \$2.00 a foot.

Q. How many feet are there on the "Richmond"?

A. I believe there are 50 feet.

Q. That is about \$100 then it cost, did it?

A. That is the "Richmond" you speak of, yes.

Q. Did you make any repairs on the boiler tubes?

(Deposition of R. A. Perry.)

When I say "you" I mean the Standard American Dredging Company.

A. I understand there were some new tubes put in the boilers whenever they were required.

Q. Have you any idea of the number of tubes that were put in?

A. No, sir, I cannot tell you. There are records of that. I don't know anything about it.

Q. Did you make any repairs on the cutter gear of the "Richmond"?

A. The term "cutter gear" on the "Richmond" in my point of view, would mean anything in connection with the transmission gear of the cutter. No doubt we did make repairs on some of the parts of the cutter gear. I do not remember what they did. Mr. Knight was the captain, who could tell you all about that. I do not keep track of it. [698]

Q. I was just wondering what repairs were made on it. A. He could tell you about it.

Q. In what condition were those gas engines that were aboard the "Richmond No. 1" when you first chartered her from the Richmond Dredging Company?

A. From reports that I have from San Rafael when she was working there, I noted a great many stops—this, by the way, was before we chartered her for Lake Merritt—on account of the engines. Therefore, before the dredge went into Lake Merritt I instructed our superintendent to send to the Samson Iron Works of Stockton, the builders of the engine, and ask them to send the best man they had

(Deposition of R. A. Perry.)

to look over these engines and overhaul them so that they would run more effectively.

Q. When was that?

A. That was about March, 1909, as near as I can remember, the correct time.

Q. That was before any of these charter-parties?

A. No, sir; it was after the charter-party was entered into.

Q. Pardon me while I look up the date. (After examination.) February 10th, 1909.

Q. It was before that time?

A. No, sir. We started making the repairs after that time with the man from the gas engine company and we repaired the engines all the time that we were moving into Lake Merritt after February 10th.

Q. When did you move the dredger into Lake Merritt?

A. Right after February 10th. That is, we commenced to move the dredger into Lake Merritt right after February 10th.

Q. What condition were those engines in at that time?

A. The engines were not in good repair; thus the reason for engaging the Samson Iron Works to overhaul them or repair them. One of the great troubles of the engine was to make good joints on the top of the cylinder heads as the walls between the valve chamber and the cylinders were somewhat eaten away. The area was [699] very small in which to secure a gasket for making a joint between

(Deposition of R. A. Perry.)

the cylinder head and cylinder and valve chamber. Salt water is used for circulating water on these engines, which causes a considerable corroding and deterioration in the metal due to the heating of the salt water. I believe new valves were installed and new rings on the valves themselves, and the pistons were installed, and many new parts, and repairs were furnished and made.

Q. To the engines? A. To the engines.

Q. That is before you started on the Lake Merritt job?

A. Yes, sir. And after we started we made a good many repairs on the engines.

Q. You made your repairs during the time you moved across from Oakland Estuary to Lake Merritt, did you not?

A. We were there pretty much all that time.

Q. How long did it take you to move from the estuary over to Lake Merritt?

A. I believe about 15 days.

Q. It took you about 15 days? A. Yes, sir.

Q. What distance is that?

A. About a mile and a quarter, I believe.

Q. What power did you use in moving her over there?

A. Horses with crabs and donkey engines, with blocks and tackles, and the dredge was on rollers.

Q. How much power would it require to move a 5,000-ton vessel across that same place—have you any idea, Mr. Perry?

A. I do not think you could move it across there

(Deposition of R. A. Perry.)

without building enormous cradles and foundations; the street would not hold it up; you would smash everything in the street. I don't think it would be practicable. This boat was light and covered a large [700] area for her weight on account of being of a scow shape; therefore, there would not be so much pressure a square foot distributed over the entire area.

Q. Just the reverse you mean?

A. No, sir. There was not so much pressure per square foot on account of the area.

Q. That is, you mean the pressure on each square foot of the keel of the vessel would be so much greater than there was on the "Oakland." That is what you mean to say?

A. That there was on the "Richmond."

Q. How much power would you say it would take to move the "Navajo" from the estuary to Lake Merritt? A. What tonnage is the "Navajo"?

Q. I mean in 15 days that you took.

A. How long is the "Navajo," and how large her tonnage? I do not know the boat.

Q. One of those boats that runs up to Sacramento.

A. She is a large boat?

Q. She is a large boat, I believe.

A. I would not like to give you an estimate on that. I do not think I would be competent. I would not like to tackle the job. She is too weak for that kind of game.

Q. You could move her?

A. I think you had better build a new boat in the

(Deposition of R. A. Perry.)

lake than to tackle that.

Q. I suppose most of those boats are strong enough to stand the pressure that would be required to pull them across the land?

A. I never heard of any boats being pulled across the land before.

Q. You were tackling a new job when you pulled across the [701] "Richmond," were you?

A. It was new to me. It was new to the man who moved her, because he bid about half what it cost him.

Q. What did you pay to have her moved?

A. I contracted to pay \$1,000. I believe I had to pay about \$3,000 before I got through.

Q. To move her over to the lake?

A. Yes, sir. He quit.

Q. Somebody was making your repairs to the engines on the dredger during the whole of the 15 days that you were moving her across the estuary to Lake Merritt, were they?

A. I could not tell you truthfully about that, but that is my understanding of it. I was in the east at the time, right after the dredger got well started, and I was in the east at the time she was delivered in Lake Merritt.

Q. Your instructions were to have the repairs made on the trip over?

A. My instructions were to repair the engines and do whatever was necessary to put them in as good a condition as they could be put in.

Q. You do not know if that job was completed be-

(Deposition of R. A. Perry.)

fore you started operations at Lake Merritt or not?

A. My people generally try to do things on time, and I should imagine it was. There was sufficient time to do it, and I think it was done all right.

Q. Do you know whether they were completed or not? A. I think they were.

Q. I am asking you now if you know.

A. I believe the repairs were all made, as we got the bills for [702] all the material and the work done. I am sure there was time enough to do all the repairs.

Q. Do you know that all the repairs that should have been made to the dredger to put her in good condition were made before you started operations at Lake Merritt? A. I am quite sure they were.

Q. Repairs to the engines particularly?

A. I am quite sure that everything was done that should be done on the dredger.

Q. How do you know that?

A. Because it was so reported to the office.

Q. That is the only way that you know it?

A. Yes, sir; I was not there. I was in the east at the time that the dredge was delivered in the lake.

Q. How many horse-power did those engines on the "Richmond No. 1" develop at the time when she was moved into Lake Merritt?

A. You mean, I suppose, when we started dredging in Lake Merritt?

Q. Yes.

A. My engineer, Mr. Johnson, tells me that he did not believe it was possible to obtain 110 or 115 horse-

(Deposition of R. A. Perry.)

power out of the engines.

Mr. LILLICK.—Q. Are you speaking of one of them or both?

A. I mean both of the engines connected as one unit would not deliver constantly more than 110 or 115 horse-power.

Mr. TAUGHER.—Q. How many yards of filling did you have to do on that Lake Merritt job?

A. I shall have to refresh my memory on the yards. I don't remember exactly how many.

Q. Have you got it there?

A. I have not got it in yards. About 475,000 yards approximately.

Q. 475,000 cubic yards? A. Yes, sir. [703]

Q. How long were you at that job?

A. I don't remember, Mr. Taugher, exactly.

Q. Can you tell us about how long?

A. I think about 7 months. That is only my recollection. I could tell by referring to the reports in the office.

Q. What was the greatest distance between the point of dredging and the point of discharge in your dredging operations in and around Lake Merritt?

A. I think we worked up to about 4,500 feet, the greatest distance of which the booster pump discharged the material, all but 800 feet which was delivered by the dredge to the booster.

Q. How long did you work in Lake Merritt before you put a booster on? A. About 3 or 4 weeks.

Q. 3 or 4 weeks? A. Yes, sir.

Q. What was the greatest distance between the

(Deposition of R. A. Perry.)

point of dredging and the point of discharging in those operations in and around Lake Merritt before you put on a booster?

A. I believe about 1,800 feet; the material being very soft mud stuff and no weight.

Q. Then it took you about 7 months to make that 475,000 cubic yards? A. 475,000 cubic yards.

Q. 475,000 cubic yards, was it?

A. Yes, sir. Pardon me. I could find out correctly about the time we were if it is important. I am only guessing at it. I can telephone over to the office and ascertain that if you desire it. [704]

Q. Did you not have some extra contracts which increased the number of cubic yards of filling to be done up to about 600,000?

A. The only contracts that we had were with the city of Oakland.

Q. You are just talking now of the first contract, are you?

A. They increased the depth of the first contract.

Q. How many cubic yards of filling did you have to do to complete your whole contract?

A. If you will permit me I will telephone over to the office and get it right.

Q. If you wish to, yes. While you are at that, I wish you would get the material to supply particulars as to the various other dredging jobs done with dredger "Richmond No. 1," to wit, the job at Eureka, the job at Alameda, and the job at Walnut Grove, as well as the job at Lake Merritt.

A. I said it was 475,000 cubic yards on Lake Mer-

(Deposition of R. A. Perry.)

ritt; but I should have said 493,092.

Q. How long was the "Richmond" on that job?

A. I do not know at present. I will have to refer to the books. The Walnut Grove contract was 180,-187 cubic yards.

Q. And the Alameda job?

A. The other job I have not got the returns over the telephone yet; they will come in a few moments.

Q. How long were you on the Lake Merritt job?

A. I have just stated I could not give correct information without referring to the books, which information will come over the telephone in a few moments.

Q. Do you know approximately how long it was?

A. I think it was 7 months on Lake Merritt. It might be longer. [705]

Q. That would be about 70,000 cubic yards a month. I will tell you what else I want. I want the greatest number of yards that you pumped in one day.

A. You will have to look all through those reports to find out.

Q. What is the greatest number of yards that you pumped in one day, and how many days that dredger was shut down during the time you were in Lake Merritt? A. That is quite a lot of dope.

Mr. LILLICK.—We will call a witness to find out.

A. (Contg.) Our Captain will prepare all this data, and you can get it from him.

Mr. TAUGHER.—Q. We do not know he is coming on the stand. If Mr. Lillick will undertake to put him on, very well.

(Deposition of R. A. Perry.)

Mr. LILLICK.—We are going to get it and will give it to you.

Mr. TAUGHER.—I can get it from Mr. Perry. I want him to bring his books here and look it up. We are going to have a real examination and not a farcical one.

Mr. LILLICK.—Proceed.

Mr. TAUGHER.—Q. You understand, Mr. Perry, what we want; the greatest number of cubic yards pumped in any one day on the Lake Merritt job; the number of days that the dredger was shut down; how many hours she worked a day during the whole of that time.

A. Why don't you allow us to furnish the number of hours per month?

Q. Do that. I do not want you to have to dig all through the mass of reports; provided you evince a reasonable disposition to give us what we want, I am not going to put you to any undue trouble at all.

A. What else do you want?

Q. I want the amount of the Eureka job and the number of days [706] that you worked there. Do you know how long the original engines were on board the "Richmond No. 1" on the Eureka job?

A. They were put on board the entire job.

Q. I mean how long you were using them for the dredging operations.

A. They were using them off and on during the whole job. If the electrical power would be shut off, we could still drive the pump by putting the pump on the gas engines.

(Deposition of R. A. Perry.)

Q. I want, in relation to that job, the number of days that you worked there, and the number of hours that you worked, and the times that you used the gas engines. And the same information in respect to the Alameda job; I want practically the same information in relation to the Walnut Grove job. I also want to know how much expense you went to for repairs on the engines on the Lake Merritt job, and on the job at Eureka, and the job at Alameda. I also want to know the amount of money you spent on repairing those engines after you received them from the warehouse over at the canal at Point Richmond in or about the month of February, 1907, and by whom those repairs were made. Bring the bills for them, in other words.

A. I might say that will be quite a job to get all that stuff; it will take some time.

Q. It will take an hour or so to get that out.

A. Worse than that. I could not undertake that job, to get all that, under 12 hours.

Q. You have got your clerks.

A. But you cannot get that all at once; that is a lot of stuff.

Q. We are going to adjourn until to-night. What you do not have to-night you can have in the morning. I understand you have a dandy system of book-keeping over there and can get the rest of it in a minute. [707]

Mr. LILLICK.—We will get it as quickly as we can.

Mr. TAUGHER.—Q. Do you think we had better

(Deposition of R. A. Perry.)

adjourn now, Mr. Perry, until you can get that up?

A. Yes.

Q. I also want how long you worked without a booster in Lake Merritt. You can get that here at half-past 7 to-night? A. I will try.

(A recess was here taken until 7:30 P. M.)

EVENING SESSION.

R. A. PERRY, cross-examination resumed.

Mr. TAUGHER.—Q. Mr. Perry, did you find out how many cubic yards of material were dredged in that job at Lake Merritt?

A. Yes.

Q. Just tell us, please.

A. The yardage was 493,092 cubic yards.

Q. How many days were you working on that job?

A. There were 203 working days that we were running, and then we were on the job 47 additional days shut down for various reasons, out of the total, making a total of 250 days.

Q. Does the 47 days come out of the 203 days, or are they an addition?

A. No. I understand the 203 days is the days that we worked.

Q. How would you tell that? Who could tell that?

A. I could telephone for it. Now, I might correct that if it can be corrected, in the proper way; I might say that the correct time that we worked the dredger on Lake Merritt job is 203 days. During this time we lost 47 days, which is exclusive of the time [708]

(Deposition of R. A. Perry.)

required to move from Oakland channel into Lake Merritt.

Q. That is, you worked 156 days?

A. Well, I will tell you, Mr. Taugher, we worked at the job 203 days in Lake Merritt, and out of that 203 days, adding all the lost time up, it amounts to 47 days.

Q. That would leave 156 days out of the 203 that you worked.

A. Not necessarily; it might be that we worked more days; a portion of them.

Q. But with the dredger you did not work to exceed 156 days?

A. That is not necessarily true; no, I would not agree to that.

Q. Well, you say that you worked altogether 203 days and that you were shut down 47 days out of those 203 days?

A. That is, adding all the time up; but you cannot segregate the 47 days from the 203 because we were not shut down 24 hours for 47 days, for instance—

Q. That is a fair inference?

A. For instance, you understand, we might only lose ten hours on one day and ten hours on some other day, and five hours on some other day.

Q. How do you figure it out that you lost that many days?

A. Well, you add those hours lost together.

Q. How many hours a day?

A. 24 hours is what we call a day.

Q. What is the highest amount of material that

(Deposition of R. A. Perry.)

you pumped in any one day on that job?

A. On the shortest day?

Q. The greatest amount.

A. The greatest amount of yards on any one day, Lake Merritt, was 3,540, and the number of feet of pipe-line on that particular day is 2,300 feet, and the number of hours was 22½. I might add, this material was very soft mud, and the lift was only about three feet.

Q. 3,540 cubic yards; but the average was about 3,000, was it not? What is the average amount of yardage that was moved a day in that job?

A. I have not got that worked out. [709]

Q. Well, that is a mere matter of calculation, any way. Now, what were you receiving on that job, how much a yard?

A. From 7 cents to 9, a little over 9; I forget the exact decimal of it. There was a difference in the price, depending on the depth we dug.

Q. What did it cost you to run the dredger "Richmond No. 1"? A. On what work?

Q. On the Lake Merritt job.

A. I could not tell you by the day.

Q. What is the average?

A. I have not got it figured up by the day, but we have it figured for the job. The cost of the job was \$54,067.99.

Q. What is the contract price?

A. \$47,622.45; it leaves a loss of \$6,445.54.

Q. Now, what does that cost include, Mr. Perry? Does that include moving it into Lake Merritt?

(Deposition of R. A. Perry.)

A. Yes; certainly.

Q. What was the cost of moving it into Lake Merritt?

A. I have not got it segregated on the trial balance, but I have got all transportation \$3,849.71.

Q. Transportation—

A. You see, we have to get it out as well as in.

Q. Transportation, how much?

A. \$3,849.71.

Q. Wages?

A. \$7,098.64, plus a commissary, which forms a part of the wages; that is the board, \$1,662.49. We pay the men, you understand, so much a month, and their board—commissary to be added.

Q. How much was the fuel? A. \$6,371.71.

Q. What else goes to make up that cost?

A. Do you want to know all the items?

Q. Yes. A. There is a whole page of stuff.

Q. How much repairs on the dredger was there?

A. Repairs and new plant together—that is the stuff that we had to buy to go with the outfit—was \$9,267.78. [710]

Q. How much of that was repairs?

A. That is not segregated here.

Q. Well, can you do it quickly?

A. No, not quickly. It is a big job to do it.

Q. What have you got in with repairs there?

A. The new parts, new plant.

Q. New parts of what?

A. Of stuff that we furnished on the job, new plant on the job.

(Deposition of R. A. Perry.)

Q. How much of that was pipe?

A. None of it. The pipe was another item. I can give you that.

Q. What was included in this thing, new plant?

A. Well, the booster pump, for instance.

Q. How much did you pay for it?

A. I could not tell you from any memorandum I have here.

Q. Approximately?

A. I think we bought it for about—

Mr. LILLICK.—I submit that does not have anything to do with the case. There is no issue involving the booster pump; you have not claimed it, or anything of the sort. It is just as much a part of Mr. Perry's plant as the typewriter over in his office. As far as I am concerned, I cannot see the materiality of a lot of these things; it is not cross-examination; that has not been gone into upon direct examination in any way whatever. I object to it only because it is encumbering the record and taking up so much time; you are now going over items that have nothing whatever to do with the case.

Mr. TAUGHER.—He can tell me generally. There is one part of the question that is material; the other part is not material. How much he paid for the booster pump, I do not care about except that I can get an idea from that what other things were included in the repairs and new plant. [711]

Mr. LILLICK.—The only object I have in mind, Mr. Taugher, is to save time. If you can specify what you want we will give it to you gladly.

(Deposition of R. A. Perry.)

Mr. TAUGHER.—Q. Can you tell that approximately, Mr. Perry?

A. I can tell you approximately; that pump we bought was a second-hand pump; we bought it from a man somewhere up around Stockton, our boys, and they paid in the neighborhood of \$400 for it.

Q. The only thing I want, Mr. Perry—I do not care about the other items—if you would tell me in a general way what you mean by “new plant”?

A. All I mean by “new plant” is this booster pump which cost in the neighborhood of \$400, and the motor which drove it which cost in the neighborhood of \$300, or \$350; it was a second-hand motor; and some transformers that cost about \$700; that is all there is to the “new plant” that I know of.

Q. That would make only \$1,200?

A. Something like that.

Q. You say you spent in repairs and new plant \$9,267? A. Yes.

Q. Did the balance go for repairs? A. Yes.

Q. The balance went for repairs on the dredger?

A. Yes.

Q. That is, you spent approximately over \$7,000 on repairs on the dredger?

A. All told, yes. In pontoons, and whatever there was to be spent; and whatever we had to add. Now the pipe cost \$6,679.83.

Q. The pipe cost that? A. Yes.

Q. How many feet of pipe, Mr. Perry?

A. I have not got the number of feet.

Q. How much did that pipe cost a foot?

(Deposition of R. A. Perry.)

A. I do not remember exactly; I do not know.
[712]

Q. The pipe cost how much?

A. All together it cost \$6,679.83, all told; all the pipe.

Q. That pipe ran about \$1 a foot, didn't it?

A. No; only 12-inch pipe, and very light at that; sheet iron pipe; part of it was not dipped even.

Q. Now, taking the Eureka job, when did you take the dredger up to Eureka?

A. In October we arrived at Eureka, October 30.

Q. Of what year?

A. We left here about the latter part of October; left San Francisco.

Q. What year? A. 1909.

Q. The latter part of October, 1909? A. Yes.

Q. How much pipe did you take up with you to Eureka? A. I do not know.

Q. About how much?

A. They took up two or three different batches. We took up a couple of thousand feet when we first went up, and took up more later on the steam schooner.

Q. How much?

A. The same way with the pontoons, we sent up on the steam schooner.

Q. How much pontoon pipe did you take up there?

A. I don't know.

Q. About how much?

A. I think we took up all we had.

Q. How much was that?

(Deposition of R. A. Perry.)

A. I think about 800 feet.

Q. How many pontoons?

A. We took up a portion of the "Richmond's" pontoons, and a portion of the pontoons that did not belong to the Richmond dredger, as they were able to stand heavier weather, and we took probably 18 or 20 pontoons altogether.

Q. What other supplies did you take up?

A. Well, we sent these all up on a steam schooner, these supplies.

Q. The pontoons?

A. The pipe and all auxiliary stuff we sent up on a steam schooner; it did not go on the dredger. We sent the spuds on the steam schooner so as to lighten the dredger up as [713] much as possible; we carried nothing on the dredge that we could send up by boat, as we wanted to keep her with as little draught and as much freeboard as possible, as we were afraid of loading her down going outside the Heads.

Q. If the water washed aboard she would hold a lot of water too.

A. We wanted to keep her as light as possible.

Q. How many tons would that dredger carry in addition to her permanent cargo, her machinery?

A. I do not think it would be safe to carry anything you could get along without putting on her on account of that trip.

Q. I mean how much would you say she could carry in addition to the permanent cargo?

A. You could not carry much of anything, as there was not space on the dredger not occupied by the

(Deposition of R. A. Perry.)

house, but no room inside of the house for stowing materials of that nature.

Q. That is inconveniently arranged for carrying freight, but she could carry it?

A. It would be impracticable to carry it on the thing. If you want to carry it you could carry it on a barge or something else.

Q. Now, how many cubic yards—how long were you engaged in the job at Eureka?

A. October 30 to May 13, 1910, at Eureka, 195 days.

Q. How many cubic yards did you dredge in that time? A. 310,438 cubic yards.

Q. How many days were you actually engaged in doing that work, I mean in the dredging work?

A. I have not got such time as we might have lost, due to break-downs or other causes, segregated from the 195 days.

Q. For whom were you doing that work?

A. The Pacific Lumber Company.

Q. What was the nature of that job?

A. Filling in behind a bulkhead. [714]

Q. Any other object? Were you paid for anything else than doing the filling?

A. Well, it was a combination job. We had to make the fill, they to build the bulkhead and dig the cut alongside of the fill.

Q. Cut a private channel.

A. It was a private channel to the Pacific Lumber Company in front of the bulkhead that they built.

Q. That is, you were to construct a private chan-

(Deposition of R. A. Perry.)

nel in front of their wharf; was that it?

A. It did not have any wharf; just had this bulkhead.

Q. In front of their bulkhead?

A. They did not have any wharf.

Q. To what depth were you to dredge?

A. 18 feet.

Q. 18 feet? A. Yes, sir.

Q. Low tide? A. Yes.

Q. For what distance? What was the extent of that dredging that you were to dredge?

A. I think it was about 3,000 feet long altogether; 2500 or 3,000 feet, as near as I can remember.

Q. How wide? A. About 160 feet, I think.

Q. Is that in the bay, in Eureka Bay?

A. Well, it might be termed Eureka Bay, but it was off away, up in some private holdings of the lumber company, that was entirely belonging to that—I have forgotten the name. I never was up on the job.

Q. But you were to construct this to an extreme depth of at least 18 feet at low tide; is that it?

A. I think we had two feet leeway; they were very anxious to have this fill made for a lumber-yard.
[715]

Q. The material that they took out of the fill you put on low lying ground for a lumber-yard?

A. They built the bulkhead and retained the material.

Q. I say, the material you took out of the cut made by the dredger you constructed this lumber-yard

(Deposition of R. A. Perry.)

with? A. Yes.

Q. What was the contract price of that job?

A. \$56,800.43.

Q. Was that for the filling or for the dredging?

A. For both.

Q. That was for both? A. Yes.

Q. How much of that was for dredging?

A. It was not segregated; just a lump sum to do the job, so much.

Q. Just one lump sum for doing the dredging and the filling? A. Yes.

Q. Have you that contract with you, Mr. Perry?

A. No.

Mr. LILLICK.—What do you want out of the contract?

Mr. TAUGHER.—The contract for the work at Eureka.

Mr. LILLICK.—I mean, what particular part of it do you want?

Mr. TAUGHER.—I want it identified and made a part of the evidence.

Mr. LILLICK.—Now, Mr. Commissioner, this is not proper cross-examination, nor has it anything to do with the case.

Mr. TAUGHER.—You examined him as to the work at Eureka.

Mr. LILLICK.—This has nothing at all to do with the case that I can see; it is delving into Mr. Perry's private business, I do not know for what purpose; apparently a fishing expedition; and we are not going to turn over the records of the Stand-

(Deposition of R. A. Perry.)

ard American Dredging Company to a competing concern; if Mr. Taugher will specify what he wants we will give it to him.

Mr. TAUGHER.—Q. Will you produce that, Mr. Perry? A. If I have it. [716]

Q. Will you admit that the principal object of that contract was for the purpose of deepening the harbor in Eureka? A. No, sir.

Mr. TAUGHER.—Then we insist upon having the contract.

Mr. LILLICK.—Q. Can you testify as to it?

A. Yes.

Q. Positively? A. Yes.

Mr. TAUGHER.—Q. The whole of Eureka Bay is navigable water?

A. Many portions of Eureka Bay you cannot float anything in, with a skiff.

Q. Where this dredging was done was it navigable water?

A. Well, only for a small portion of the way.

Q. When you finished with it it was navigable for the whole distance, was it?

A. When we finished with this channel it was in such condition that a steam schooner could float in this channel where we dredged.

Mr. LILLICK.—We have no objection to going into that.

Mr. TAUGHER.—I want that contract to go in for the purpose of showing that the dredger is used principally for the purpose of deepening harbors.

The WITNESS.—That was not the purpose there.

(Deposition of R. A. Perry.)

They spent a large amount of money for constructing a bulkhead and rocking it; in fact, they wanted me to undertake the contract of filling this bulkhead and guarantee it under their plans. I refused flatly to have anything to do with the bulkhead on their plans, but told them I would make them plans of a bulkhead that I would guarantee for them if they wanted me to build it, providing they paid me enough money for it, or I told them that I would make them plans of the bulkhead and make specifications that I could recommend to them, and that I was sure they would stand if carried [717] out in that way. They only wanted to build a bulkhead with piles, and I told them it would not stay there; they wanted this filling completed particularly so that they could pile the lumber on the fill. They finally accepted my proposition, whereupon we furnished plans and specifications and they built the bulkhead accordingly and spent a lot of money on it, rocking it and we entered into a contract for dredging the cut and making the fill up to a certain grade; it was specified we had to fill to a certain elevation.

Mr. TAUGHER.—We would ask to have that contract.

Mr. LILLICK.—Don't you want the Lake Merritt contract?

Mr. TAUGHER.—No, I do not care about that.

Mr. LILLICK.—I think that speaks volumes for the position these gentlemen are taking. You can ask any questions you want about that, but we object to handing it over to you.

(Deposition of R. A. Perry.)

Mr. TAUGHER.—We are conducting our side of the case.

Q. What was the average income of the dredger per day on that job, Mr. Perry?

A. I could not tell you the average income per day as I have not figured it that way.

Q. How much did that job cost you?

A. Personally, I do not like to tell my competitors in the dredging business how much work costs.

Q. That is not the object of it at all, Mr. Perry. The only thing I want to know is what the worth of the dredger was.

A. I have told you the contract price, that it was \$56,800.43. I do not think I ought to be asked how much it cost me.

Q. Well, then, how many cubic yards of material did you move? A. 310,438.

Q. Then, you were getting about 20 cents a yard for moving that [718] material, a little more than 20 cents a yard?

A. Less than 20 cents a yard, I think.

Q. How much less? A. About 19 cents.

Q. How far did you deposit that material from the point of dredging? A. From 800 to 2,000 feet.

Q. That was rather hard stuff to dredge, was it?

A. Well, it was about one-third mud and two-thirds sand.

Q. That makes a pretty hard combination, does it not?

A. No, makes pretty fair stuff to handle for that distance; enough soft stuff in it so as to make it rea-

(Deposition of R. A. Perry.)

sonably decent to handle.

Q. How long did it take you to tow the dredger up to Eureka? A. Inside of 48 hours.

Q. What kind of vessel towed her?

A. One of the large tugs of the Shipowners and Merchants' Tugboat Company.

Q. What brought her back?

A. The same company's boat, the same type of boat.

Q. It took 48 hours to go up? A. Yes.

Q. How many miles from here to Eureka by water?

A. I think it is about 225 miles. I am not dead sure about that.

Q. Well, if you do not want to tell us the profit you made, I do not care. We are not looking for the profits a day. I do not want you to think I am trying to pry into your business, as far as that goes, that is not my object at all.

A. You particularly wanted to know about the Lake Merritt business. I do not like to tell about all the jobs I do. I do not think, how much I make or how much I don't make, that is a fair proposition to me.

Q. I am not inclined to be unfair at all, and I do not want you to think I am prying into your business for the purpose of [719] giving a possible competitor a line. How much repairs did you put on the dredger on the Eureka job? A. \$2,959.68.

Q. On the dredger?

A. That is not specified entirely on the dredger.

(Deposition of R. A. Perry.)

It says repairs. It might be something upon the pontoon line, it might be a scow or flats for the pontoon line; there might be some on the—

Q. (Intg.) On the shore pipe?

A. No, sir; the pipe is another separate account always with us.

Q. Then that would be on the dredger, the equipment of the dredger?

A. Then in addition to that we run another account where we buy a new piece, like, for instance, if we had a feed pump that was bought for feeding the boiler, that was run into an account called new plant.

Q. How much new plant?

A. The total new plant we bought on the job \$4,626.25.

Q. That is in addition to the repairs?

A. Yes, sir.

Q. What repairs, do you remember, were made upon the dredger or her engines on the job at Eureka—if you can, tell us? A. \$310.

Q. \$310? A. Yes.

Q. Made on the—

A. Expenses on the gas engine, Eureka, \$310.

Q. What was done there?

A. I could not tell you, Mr. Taugher.

Q. You do not specify the repairs?

A. No. That takes a long time to check that up, miscellaneous stuff.

Q. Can you tell me generally what was done to these engines there?

(Deposition of R. A. Perry.)

A. No, I could not tell you that. I never was up there while the thing was there. The gas engines were used at Eureka approximately 30 days on the job. [720]

Q. Do you know how far they pumped?

A. They pumped, when that was on the short line, around 800 or 900 feet. After we had the motors there, we put 250 horse-power on the pump and 50 horse-power on the cutter, electric motors. By the time we had those on—before we had those on, we used the dredge on the shortest line possible so as to favor the pump all we could, on account of the smaller power.

Q. Coming down to the job at Alameda, when did you do that job at Alameda?

A. May 28th to July 24 was the time on the job.

Q. What year? A. 1910.

Q. How many days? A. 57 days, all told.

Q. That you were actually working, or is that between the commencement and the finish of the job?

A. Commencement and finish of the job. I have not got the detail of how many days we lost. We lost, I know, about a week once on account of the bulkhead breaking down; otherwise we ran as much as we could. They were aground some of the times at low tide, and I should judge we probably lost, all told, on the job as much as 14 days out of the 57 days.

Q. You would be running about 43 days then?

A. Approximately. Do you wish to know the yardage in the job?

(Deposition of R. A. Perry.)

Q. Yes. A. There was 63,567 cubic yards.

Q. Now, how much a cubic yard did you get for that? What kind of a job was that?

A. That was strictly a filling job, filling a bulk-head for the purpose of making land belonging to Mr. George Emmons of San Francisco.

Q. How much did you get a yard for that dredging?

A. I have not got that data before me but I think it was 9½ or 10 cents. [721]

Q. 9½ or 10 cents a yard for the dredging?

A. Yes, sir.

Q. Not more than that? A. No.

Q. Was that a losing job?

A. I do not want to tell you whether it was a losing job.

Q. Then the job at Walnut Grove—where is Walnut Grove, where you were doing this dredging work?

A. It is on the Sacramento River about 30 or 40 miles above Rio Vista.

Q. How far this side of Sacramento is it?

A. I think about 30 or 40 miles.

Q. 35 or 40 miles this side of Sacramento?

A. Yes.

Q. How many cubic yards of dredging did you have at that point? A. 180,177.

Q. How many days were you engaged on that job?

Mr. LILLICK.—Q. Is that filling or dredging, Mr. Perry?

A. Filling in the embankment, 180,177 cubic yards;

(Deposition of R. A. Perry.)
a railroad embankment.

Mr. TAUGHER.—Q. How many days were you engaged? A. 124 days on the job.

Q. How much a day did you fill on the average?

A. Well, I do not know how many yards a day. I have not got it segregated.

Q. Approximately?

A. Well, we would not do any regular yardage; some days have a good day and some days would be poor.

Q. About 1500 yards you averaged?

A. Sometimes 800 only.

Q. But the average is about 1500, is it? You say 124 working days.

A. 124 days on the job from the arrival until we got through. That don't include the moving to nor coming away from the job.

Q. How many days were you shut down during that time, for various causes?

A. I do not think we lost more than about 12 days [722] on that job for shut-downs. Well, I may say 15 days actually stopped work.

Q. 15 days actually stopped?

A. Portions of days, we got stuck for a while.

Q. Then the average was about 1,500 a day, was it? A. Cubic yards?

Q. Yes.

A. About 1,400, if you divide the total amount by the 124 days on that job, but some of the 124 days,—for 15 days we would be shut down, I suppose.

(Deposition of R. A. Perry.)

Q. The days you were pumping you were running about 1,500?

A. We would run anyway from 800 to 1,500; it depends; some days it would be pretty good and some days we would do pretty poor.

Q. You averaged more than 1,500?

A. No. 109 days into 180,000 cubic yards, in round figures, that would be over that.

Q. How much a cubic yard were you getting for that filling?

A. We got 34 cents. I might add that the cost of delivering the material to the fill was only about one-half of what it cost to take care of it when we got it there. We had over 60 men on the levee; it was a railroad embankment, very narrow, and we had to build it up from 20 to 25 feet high above the natural ground and make a true slope with it, and the sand was very coarse and we could not hold the water with it. In other words, we could not build a levee to hold water in; we had sometimes more than 60 men on the job, on the levee alone.

Q. Now in the job at Eureka did you use a booster? A. No, sir.

Q. You did not use a booster there?

A. We had sufficient power because with the motor, with the electric motor, as the lift was not to exceed 91½ feet above the water, and the pipe-line, and [723] the extreme pipe-line under our contract was specified that at no time should be required to pump material greater than 2,000 feet distance; a portion of the time it was only 800 feet,

(Deposition of R. A. Perry.)

and a great deal of the time it was not more than 1,200 feet.

Q. You did not need a booster up there?

A. No; we had 250 horse-power on the motor, which is twice the amount.

Q. Why did you put on a motor up there?

A. So as to get sufficient power to deliver the material with some speed and go.

Q. Did that material need to be delivered with any particular speed?

A. Well, if you don't get any speed on things you don't make any money.

Q. Couldn't you get speed out of the gas engines?

A. We could not get the output in yards with 125 horse-power, or whatever they gave, that we could with double the horse-power which we had from the motor. You understand, the way the gas engines were laid out, they were to drive the pump and cutter and dredger, as laid out on the dredger, therefore the cutter took away that much from the pump; as we put on an electric motor of 50 horse-power to disintegrate the material and then we had a 250 horse-power motor to drive the pump along, and the 250 horse-power motor would stand an overload at any time it was called on for a period of several hours, without doing any damage to the motor, of at least 33 per cent.

Q. What horse-power would those engines develop when you started the Lake Merritt job?

A. We believed that the engines would not deliver more than 110 horse-power, both engines.

(Deposition of R. A. Perry.)

Q. Both engines? A. Yes.

Q. How much would they deliver when you commenced the job at [724] Eureka?

A. We assumed they would deliver 110 horsepower at that time.

Q. You assumed?

A. We believed they would deliver 110 horsepower. We had no indicator on the engines to show the correct horse-power at any time.

Q. How much horse-power would they deliver when you started the Alameda job?

A. They would deliver 110 horse-power there.

Q. How much horse-power would they deliver when you took them off the dredger?

A. They would deliver 110 horse-power when we took them off the dredger.

Q. How much horse-power will they deliver now?

A. They will deliver 110 horse-power now.

Q. That is, they will deliver just as much horse-power now as when you started the Lake Merritt job?

A. Yes, they will, if they are not rusted in any way by laying up; if they are they will have to be oiled up; if they leak you would have to put in new rings; it might be possible to loosen up the rings and the piston because the engines have laid idle now for about ten months.

Q. How much repairs did you make on the engines on the Eureka job? A. \$310.

Q. On the Eureka job? A. Yes.

(Deposition of R. A. Perry.)

Q. What was the value of the repairs on the Lake Merritt job?

A. I might suggest that I told you that; it is in the record here; and you have got the bills for it here.

Q. How much was that, I have forgotten.

A. I think it was \$780.

Q. \$780 on the Lake Merritt job?

A. I think that is it. You have already got a record of that, and the bills have been turned in as one of the exhibits. [725]

Q. How much did you say it was, Mr. Perry?

A. I believe it was \$780.

Q. And you said in one place the repairing and new materials cost \$9267.

A. I did not say that was on the gas engines, Mr. Taugher.

Q. That was on the dredger generally?

A. The job.

Q. On the job?

A. Yes, whatever it might be.

Q. But the repairs on the gas engine on the Lake Merritt job was \$780.

A. Well, there was as much as that; we have bills to show that much, and turned in as part of the exhibit.

Q. Can you tell me what repairs were made on the engines on the Eureka job?

A. I could not tell you it myself because I do not know.

Q. Who could tell?

(Deposition of R. A. Perry.)

A. I may say that probably Mr. Knight, who was the captain and engineer of the outfit, he would know, but I do not know. I never was on the job.

Q. What power did you use on the Alameda job?

A. We used the "Richmond's" gas engines part of the time.

Q. The new engines that you put on?

A. No; we used the original engines that belonged to the dredge "Richmond" a portion of the time, and we used a portion of the time the engines only which we had chartered from the Atlas Gas Engine Company.

Q. What kind of a job was that, the Alameda job? Just tell us what kind of a job that was. How far from the point of dredging did you deliver the material?

A. From 500 feet to not to exceed 1,000 feet at the greatest pipe-line.

Q. What kind of material was it you were dredging?

A. Part mud and part sand.

Q. Would you say it was hard material or otherwise?

A. No, it was soft.

Q. And easy to dredge? A. Yes. [726]

Q. How much did you elevate that?

A. From 4 feet to 10 feet. The reason for the different elevations is that on the lower level of the fill we cut a hole in the concrete wall, and kept the pipe low as long as we could; then as the fill raised, we had to raise the pipe to suit the fill, and then we got up to the highest elevation mentioned.

Q. That was rather a hard job to do, was it?

(Deposition of R. A. Perry.)

A. No, the job was not a hard job to do, but the wall fell down and lost us some time, and we had a dispute with the owner about the quantity of material that run out. He guaranteed the bulkhead, and this stuff run out, and he said we had too much soft stuff in there or the bulkhead would not have broken down; outside of that trouble that we had about the bulkhead, the job was not a hard job.

Q. Then you would say that Alameda job was not a trying job on the dredger?

A. No, that was not a severe job, because there was not mud enough for to amount to anything; it was only 63,000 cubic yards, all told.

Q. Which gas engine did you put on then, the one you got from the Atlas Gas Engine Company?

A. I operated the dredge "Richmond's" gas engines, both of them, and then I put on the gas engine which we chartered from the Atlas Gas Engine Company on the deck; did not move the "Richmond's" gas engines at all.

Q. Then did you have the three engines going?

A. I put another pulley—I had a special pulley that I put on; it was our idea to hook the "Richmond's" engines up on their own power, and then we put another pulley to run a belt off the Atlas gas engine to another pulley that we put on the pump shaft; that is, we put another pulley on the pump shaft for use of the engine which we chartered. However, we operated, I believe, at times only one [727] of the "Richmond's" engines and the one which we chartered belonging to the Atlas Gas En-

(Deposition of R. A. Perry.)

gine Company. I personally was away a portion of the time.

Q. Did you actually have the three engines running at any time?

A. I believe we did, Mr. Taugher, although I was not on the job when it was done.

Q. Who would know?

A. Mr. Knight was there.

Q. Mr. Knight? A. Yes, he was there.

Q. Where is Mr. Knight now?

A. Mr. Knight will be a witness in the case. He is working for us in Oakland.

Q. Still working for you? A. Yes.

Q. He is not a member of the company? A. No.

Q. He is working in Oakland?

A. For us, in Oakland.

Q. Well, how long did you work the Atlas Company's engine and one of the engines of the Richmond Dredging Company's engines on that Alameda job?

A. I cannot tell you. I was not over there more than twice during the job.

Q. Where did you set that other engine, on the deck? A. Yes, the engine-room deck.

Q. The engine-room deck?

A. Yes, led the belt down to the pump shaft; did not disturb the other mechanism at all.

Q. Did that work all right?

A. Oh, yes, it worked there all right, as well as any other place.

Q. I know, but could you get power from that en-

(Deposition of R. A. Perry.)

gine in that position?

A. Oh, yes, get power in any position, no matter how they set. With regard to the operation of the engines at Alameda, our Mr. Knight, the captain and chief engineer would be better able to tell you the exact details of the operation, as I was not on the job more than once or twice.

Q. Do any records that you have show the length of time that you [728] operated the Atlas gas engine with the Richmond Company's engine on the Alameda job?

A. I doubt if the records would show that.

Q. Have you any way of discovering how long they worked the Atlas gas engine with either one or both of the dredger "Richmond's" engines?

A. I think not. I do not think we would keep any record of that because it was of no consequence, and I would not ask the men to do that; not particular about doing any more bookkeeping on the dredgers than we can help.

Q. Then there is no way you can discover how long that condition existed. A. I think not.

Q. Did you ever run the dredger on the Alameda job with the Atlas gas engine alone?

A. I do not know.

Q. Have you been told so by one of your employees?

A. I will say I prefer not to testify to something I do not know personally about, on the engines, that I did not see myself, as we will furnish our captain to testify to anything you want as regards the way

(Deposition of R. A. Perry.)

the engines were run and how they were run.

Q. You will furnish that captain, will you?

A. Yes.

Q. Could you have used the booster on their job?

A. No, sir.

Q. Why not?

A. Unnecessary; as the pipe-line did not require it.

Q. How much power would the Richmond Dredging Company's engines develop on the Alameda job?

A. 110 horse-power.

Q. 110 horse-power?

A. Yes; that is both engines.

Q. If they had run?

A. They would not develop anything if they did not run.

Q. How much repairs did you put on the Alameda job?

A. I am not prepared to answer that yet. I am waiting for a message from the office for the balance of the information as to that. There were two or three items I did not get. I will receive a telephone message pretty soon.

Q. When did you take off the engines that were on board the dredger "Richmond No. 1"? When was she chartered to you? [729]

A. About August 1st.

Q. August 1st of what year?

A. 1910. I might correct that by saying, during the month of August, 1910.

(Deposition of R. A. Perry.)

Q. Where was the dredger when you took off those engines?

A. I do not remember whether they were taken off on the way up to Walnut Grove or taken off before we started for Walnut Grove.

Q. Had you finished the Alameda job before they were taken off?

A. I do not remember exactly.

Q. Did you do part of the Alameda job with engines other than the engines that were on the "Richmond" when you got here?

A. I do not remember that exactly. I was not here all the time, I was in the south part of the time.

Q. What did you do with the engines when you took them off the dredger "No. 1"?

A. We delivered them at Richmond, put them on the wharf in front of the warehouse of the Richmond Dredging Company, or the Richmond Land and Improvement Company, I don't know who owns it.

Q. You don't know who owns it?

A. I am not positive about that.

Q. Did you ask anybody's permission to put them there?

A. I do not remember whether any permission was asked of the owners of the dock or not.

Q. Do you remember when you put them there?

A. I think sometime in August, 1910.

Q. How long did they remain there?

A. On the wharf?

Q. Yes.

A. It might have been a month. There was a

(Deposition of R. A. Perry.)

record made when they moved them into the warehouse.

Q. Who moved them into the warehouse?

A. I think Mr. Cutting's men moved them into the warehouse.

Q. Did you request them to move them into the warehouse?

A. I believe we did, we did not have any men handy there.

Q. When did you take the engines away from that warehouse? [730]

A. I believe it was late in December of 1910, for the purpose of installing them in the dredger "Richmond."

Q. Did you make any repairs on the engines after you took them from that warehouse?

A. Yes, sir.

Q. What repairs did you make on it?

A. I could not tell you the whole of it. I can tell you approximately the cost of the machine repairs without the labor.

Q. All right; what is the cost?

A. We have a memorandum here of three hundred odd dollars.

Q. Three hundred dollars' repairs after you took them from the warehouse? A. Yes, sir.

Q. Who made those repairs?

A. The Atlas Gas Engine Works did a part of them, and I believe the Samson Iron Works furnished some material, although I am not positive; but that is a matter that can be determined, if it is

(Deposition of R. A. Perry.)

essential. I know the Atlas Gas Engine Company did a large portion of the repairs, as they were right handy close by; they had the dredge up near their shop.

Q. Have you got those bills?

A. I have not got them here.

Q. Will you produce them in the morning?

A. Yes, we can get them.

Q. You will produce those bills in the morning?

A. I will try to.

Q. The Atlas Gas Engine Company, do you remember how much their repairs were?

A. No, I have only the items of the bookkeeper, approximately \$300.

Q. The Samson Iron Works did some?

A. I do not know the amount either one did.

Q. Do you know what repairs were made on these engines? A. Not to my own knowledge, no.

Q. Did you have the engines painted? [731]

A. I think they were cleaned up. I think everything was cleaned up and a coat of paint given the outside of the dredge, everything cleaned generally.

Q. Outside the dredger or outside the engine?

A. Outside of the dredging-house. I think the house was painted, and I think the engine and other stuff had one coat of paint, I think, and all the other stuff was cleaned up.

Q. When did you finish the job at Walnut Grove?

A. I have not got the date before me.

Q. Can you tell us approximately?

A. I can give it to you in a few minutes.

(Deposition of R. A. Perry.)

Q. When you finished the job at Walnut Grove, can you get that now? I would like to put it in here.

A. Very well, December 2, 1910.

Q. I want particularly these bills for the repairs done subsequent to the taking of the engines from the warehouse along in December or January last.

A. Well, I have told him to do the best he could to get them in the morning.

Q. Did anybody besides the Atlas Gas Engine Company and the Samson Iron Works do any repairs on these engines?

A. We had some machinists of our own that were working on the repairs, general repairs; they overhauled them.

Q. Did you have any of your own men doing any of the repairing on the gas engine?

A. Very likely.

Q. You do not know whether they did or not, or do you know?

A. I do not know just what they were doing personally, but they were overhauling the dredge, you see, and anything that was to be done they were doing.

Q. As I understand it, your testimony was that the repairs were [732] made on the engines by the Atlas Gas Engine Company and by the Samson Iron Works. Do you want to change your testimony in that respect, to add something to it?

Mr. LILLICK.—Q. Do you know that of your own knowledge, Mr. Perry, or are you assuming that is so?

(Deposition of R. A. Perry.)

A. I know that the Atlas Gas Engine Works did some work on the engines at that time, because we got bills from them. How much our men did, I personally do not know what records we have; I would have to look it up to see.

Mr. TAUGHER.—Q. You will be able to tell us that in the morning?

A. I am going to try to do the best I can.

Q. How many hours a day did you work those engines in the Lake Merritt job?

A. I could not tell you how many hours a day we worked them.

Q. On an average?

A. We run—you mean how many hours we run on the job?

Q. Well, yes, let us have that?

A. We run 3,743 hours on the Lake Merritt job.

Q. How many days were you not working on that job? A. 47 days.

Q. 47 days you were not working? A. Yes, sir.

Q. How many days were you actually working?

A. You have that all in the record now; I have told you a couple of times.

Q. I was trying to work out the average number of hours.

A. You better stop then and figure that out if that is what you want.

Q. It is one hour less on the whole job than 24 hours a day?

A. There might be an error in that thing. That is the way we got it; we added up all the hours we

(Deposition of R. A. Perry.)

lost, you see. In [733] other words, if you took 47 days and multiplied it by 24 hours, I guess that whole thing would check, as that was the time we lost. A day is 24 hours, you see, the way we reckon it. Of course, we would not mean that the engines run 24 hours a day for 156 days; it would mean out of the 203 days the engines run 3,743 hours.

Q. Why were you shut down those 47 days; can you tell us?

A. That was broken time; in other words, you lose maybe 6 hours day, other days 7 hours, for various causes.

Q. What was the principal cause of the shut-downs?

A. I could not tell you that. I would have to look at the reports to ascertain that.

Q. Can you tell me generally?

A. No, sir; I would not know anything about it myself.

Q. What was the most prolific cause of the shut-downs?

A. I could not tell you. I would have to refer to the reports.

Q. Can you tell us in the morning?

A. There are too many reports; there is 203 reports to look over, and segregate every hour out of them.

Q. You said this morning, Mr. Perry, that you could not overload gas engines; is that the fact?

A. Yes, that is a fact.

Q. You want that statement to go, that it is im-

(Deposition of R. A. Perry.)

possible for you to overwork gas engines?

A. I made my explanation here early in the cross-examination, I think.

Q. I have not asked you anything on that on cross-examination at all.

A. I was trying to get rid of explaining the whole thing again, Mr. Taugher.

Q. I did not ask you about it on cross-examination at all. Whatever your explanation was you gave on direct examination. I [734] have not cross-examined you on that point at all.

A. I still believe you could not overload those gas engines beyond the point they were designed to work; in other words, you could not take any horse-power from them than they were designed for.

Q. All right. I understand that.

Mr. LILLICK.—Q. Could you strain them by attempting to put on more? A. I think not.

Mr. TAUGHER.—Q. How much are those engines designed to carry?

A. I think about 110 horse-power; that is the two units tied together.

Q. And the dredger was built for 110 horse-power engines?

A. Well, that does not follow, and you can put as much horse-power as you like, within reason, on a 12-inch pump; in other words, you can do some work with 100 horse-power; you can do some work with 200 horse-power, or you can use 400 horse-power on it, if you drive enough revolutions.

Q. What is the effect of that on the dredger?

(Deposition of R. A. Perry.)

A. It don't affect the dredger any.

Q. It does not affect the dredger any?

A. No, sir.

Q. Doubling the horse-power of the engines would not affect or hurt the dredger any? A. No, sir.

Q. Didn't you change the pulley on the pump-shaft? A. Yes, I believe so.

Q. Shortly after you took it? A. I believe so.

Q. What was the effect of that change?

A. That would allow the gas engine to drive the pump faster, that is, providing the [735] pulley on the pump was made smaller.

Q. Didn't it necessitate the faster operation of that pump?

A. If the pulley were made smaller?

Q. Well, the fact, what you did do to the pulley—you understand the question all right?

A. Read the question, please.

(The question repeated by the Reporter.)

Q. Don't you understand that question?

A. No, I do not understand that question.

Q. Did you put a larger or smaller pulley on the pump than was on there when the dredger was turned over to you?

A. I could not tell you at that time.

Q. You could not tell?

A. I could not tell you now, no. I know the pulley was changed, either made smaller or larger. I do not know for sure which.

Q. At whose instance was that pulley changed?

A. I could not tell you that. There were pulleys

(Deposition of R. A. Perry.)

on the dredger when we got it, I believe, which provided for changing the pulleys as the speed of the pump might be required. You understand when you have a long pipe-line, you want more speed than when you have a short pipe-line; and furthermore, the longer the pipe-line on a hydraulic dredge, the easier it is to revolve the pump up to the same speed; it takes less horse-power. Consequently, if you are going to deliver the same amount of cubic gallons of water on a long pipe-line that you would on a short pipe-line, you must necessarily increase the speed of the impeller in the pump enough to overcome the additional friction caused by the long pipe-line. Do you understand me?

Q. Yes, I follow you. How far would those engines pump without the booster when you received them from the Richmond Dredging Company?
[736]

A. Well, they would pump water and very soft mud and water a couple of thousand feet on a level.

Q. Did they do that in the Lake Merritt job?

A. Under the conditions that I spoke of they did pump a couple of thousand feet, about a two or three feet lift.

Q. What were the conditions that they did pump?

A. Yes.

Q. I say, what was the condition? What was the greatest distance between the point of dredging and the point of discharging before a booster was put on in the Lake Merritt job? A. About 2,300 feet.

Q. How many yards of material did they deliver

(Deposition of R. A. Perry.)

per day prior to putting on the booster?

A. The quantity was quite varied.

Q. What caused the variance?

A. Some days you would get in good running time, and some days you would not.

Q. What was the average per hour when you did run before the booster was put on?

A. About 160 to 175 cubic yards.

Q. 160 to 175 yards per hour?

A. From 150 to 175 yards, about.

Q. You now want to change it to 150 to 175 yards?

A. Yes; that is about the correct thing.

Q. 150 to 175 yards?

A. This material that I speak of was very soft mud; there was no elevation to the pipe at that time.

Q. You can fix it any way you like, Mr. Perry. I want to know the facts.

A. Well, the reason why I stated that, we are not pumping sand but pumping very soft mud; had we been pumping sand the output would not have been as much; it would have been very different, [737] much lower.

Q. What did you tell us you had to lift the material in the Eureka job?

A. The greatest elevation, I think, was plus ten above.

Q. The greatest elevation? A. Yes.

Q. What proportion of the material was elevated to plus ten?

A. Probably about half of it. I am not sure.

Q. What was the other half?

(Deposition of R. A. Perry.)

A. It did not exceed plus ten.

Q. I know; but what did the other half do—did the other half drop into a depression, that is below high tide?

A. We put the pipe-line in through the bulkhead at a lower point while the fill was low and as the filling rose the pipe was raised.

Q. What was the nature of the ground on which you made that filling at Eureka before you started doing any filling?

A. Some of it was below the water line.

Q. How much of it?

A. I could not tell you exactly.

Q. The larger portion of it?

A. No, I do not know—about half, probably, a little below the water line, ground line—the tide came up on a portion of it.

Q. What is that plus ten?

A. Plus ten above low tide.

Q. What is the elevation? A. About $61\frac{1}{2}$ feet.

Q. So, it was just about the same at high tide—at high tide on the highland you would not have to raise it much?

A. Well, we could not change our pipe-line whenever the tide raised.

Q. The tide changed it for you, didn't it?

A. No. At high tide we would not have quite so high to elevate because the dredger lifted up so much; then the discharge pipe was fixed in such a way we would move it. [738]

Q. Well, that was about the same condition as the

(Deposition of R. A. Perry.)

Lake Merritt job?

A. No, sir. The tide was held in the Lake Merritt job, and we held it up due to the flood-gates provided in the Lake Merritt; the tide would be kept sometimes in there for a week without any ebb tide; take it in at high tide and hold it there.

Q. What was the highest elevation in the Lake Merritt job?

A. At the last end of the job probably run up to 6 or 8 feet.

Q. Then how high did you hold the water up in the lake? A. To plus 6 above low tide.

Q. So you only had to elevate the highest part of it two feet above where you were held by the water of the lake?

A. Except sometimes they would flush the lake and let the water out for one tide so as to get rid of the sewage.

Q. When it came back in you could pull it up again when you wanted to? A. Shut the gate again.

Q. Now, about the same condition existed on this Alameda job? A. No, not the same condition.

Q. What was the highest point you had to lift it there on the Alameda job?

A. About 10 feet at the highest.

Q. At the highest? A. Yes, sir.

Q. What proportion or percentage had to be elevated to 10 feet, would you say?

A. Oh, probably half of it.

Q. Half about 10 feet? A. Yes.

Q. The other half—what was the nature of ground

(Deposition of R. A. Perry.)

before you started filling? A. It was beach.

Q. Beach?

A. Beach ground, yes; mud flats; tide flats.

Q. Now, you say you put the engine of the Atlas Gas Engine Company on the main deck?

A. Yes, sir.

Q. Did it work all right from there? A. Yes.

[739]

Q. You said this morning that you could have put both engines on there, had you wanted to; is that the fact? A. Could have been done.

Q. Why didn't you do it? A. Didn't want to.

Q. Well, why didn't you want to? You must have had some reason.

A. Wanted to make more space, more room around there; no use taking the other engine when you could set them down in the same place they were set at with the same belt centers; you understand, Mr. Taugher, taking off 100 horse-power off the belt, and the belt is the same width, you do not need the same belt centers that you would if taking off 200 horse-power or 225 horse-power; therefore you would get better service and you would not have to have the belt so tight if you get more distance; therefore you could have built up a platform over the top of this Richmond gas engine had it been desirable or necessary or convenient and got the belt centers by throwing a couple of beams across the main deck and moving them right on top or directly over the "Richmond" engines.

Q. Why didn't you do that?

(Deposition of R. A. Perry.)

A. We considered it an advantage to do what we did do.

Q. Did you say anything to the Richmond Dredging Company or any of its officers about moving these engines off the "Richmond"?

A. I don't remember.

Q. Did you instruct any of the officers or agents of the Standard American Dredging Company to notify the Richmond Dredging Company, or any of its officers, that you were going to move off the engines?

A. I don't remember any conversation [740] with them at all about it.

Q. Did you ask the Richmond Dredging Company to store the old engines we put over on the dock there?

A. I think we asked them to put them in the warehouse and that we would pay for the expense that was necessary to move the engines in there as our men were not there and they had some men there.

Q. Did you yourself do that? A. I think so.

Q. Who did you ask?

A. I think I telephoned to Mr. Wernse.

Q. When did you telephone to Mr. Wernse?

A. I do not remember at the present date that I telephoned to Mr. Wernse.

Q. Do you want us to understand, are we to understand positively that you did telephone to Mr. Wernse? A. I am quite positive that I did.

Q. You are quite positive that you did?

A. Yes, sir.

(Deposition of R. A. Perry.)

Q. What did you ask him to do?

A. He wrote me a letter and told me that the engines, where he had placed them on the wharf in front of the warehouse, might slip into the water, as the wharf was not safe, and I asked Mr. Wernse if he could not take some of his men that he had over there and move the engines in and charge the time up to us.

Q. Is that the first notification you had or had you notified them concerning those engines prior to that time? A. I don't remember about it.

Q. Well, would you say that was the first or the second or third conversation that you had with Mr. Wernse concerning those engines?

A. Oh, I think I spoke to him before about them, although I do not remember about it. [741]

Q. What do you say the ordinary life of the gas engine such as on the dredger "Richmond No. 1" at the time you chartered her from the Richmond Dredging Company is, with good care?

A. Well, the salt water for circulating around the cylinder jacket, considering the construction and design of those particular engines, I would not expect they would last as well as more modern designed engines which are particularly designed to carry salt water for a jacket—I could not say exactly how long they ought to last.

Q. You do not care to state what the life of those engines would be with good care? A. No, sir.

Q. You say that the cylinder on the engine that

(Deposition of R. A. Perry.)

you got from the California Reclamation Company was cracked?

A. The cylinder jacket was cracked.

Q. The cylinder jacket, rather; and also the cylinder jacket on the engine that you got from the Atlas Gas Engine Company—both cracked, were they?

A. Yes; both engines had their jackets cracked.

Q. Did that let the water get into the firing chamber in either of those engines?

A. It did until they were repaired; they were patched.

Q. What is the effect of water getting into the firing chamber on a gas engine?

A. It does not cause them to work very well.

Q. No; we understand that. Can you tell us what the effect is?

A. Yes; it keeps the gas from expanding properly and destroys the discharge to a certain extent, the explosion. [742]

Q. Any other effect?

A. If it is allowed to continue forever, why it would probably have other effects.

Q. Well, suppose allowed to continue for a day, what would be the effect of it?

A. It would not hurt anything.

Q. Suppose it were allowed to continue for a week?

A. It would not make any material damage.

Q. How long would it take to start the damage?

A. I could not tell you.

(Deposition of R. A. Perry.)

Q. How many months did you keep that engine at that rental of \$200 a month—that is, the engine that you received from the Atlas Gas Engine Company?

A. As near as I remember, between 5 and 6 months.

Q. Did you pay \$200 a month for the use of it during that time?

A. We paid whatever the charter says—I think it is \$200 a month.

Q. Don't you know? A. Yes, \$200 a month.

Q. Did you return that engine to them?

A. Yes.

Q. Where is that engine now, do you know?

A. No idea.

Q. Pardon? A. No idea.

Q. Did you pay anything on repairs for it, in addition to this \$200 a month? A. I don't know.

Q. You don't know? A. No.

Q. Can you know in the morning? A. No.

Q. Why not?

A. Because I am not going to set up all night to find out that; those fellows have all gone home now.

Q. Can you have that information in the morning?

A. I might be able to get it by 9 or 10 o'clock.

Q. I would like to have that information, because it is quite important. You have a note of that, have you, Mr. Perry? A. Yes. [743]

Q. Now, the lease of that engine was made by the Atlas Gas Engine Company to R. A. Perry. This was made to you personally, was it, Mr. Perry?

(Deposition of R. A. Perry.)

A. Don't the charter-party tell you who it was made to?

Q. This is the lease of that engine; this is made to R. A. Perry? A. Yes.

Q. Well, then, did you personally rent it to the Standard American Dredging Company?

A. I turned it over to the company.

Q. Did you rent it to the Standard American Dredging Company? A. They paid the rent.

Q. Read the question, Mr. Reporter. (The Reporter reads the question.) You have heard the question. Now, did you rent it to the Standard American Dredging Company?

A. There was not any written agreement, but I turned the engine over to them. It was rented for their use by me, and they paid the rent.

Q. You say it was rented for their use?

A. Yes, sir.

Q. Where was it intended by them to be used?

A. In the dredger "Richmond."

Q. It was for use on this dredger "Richmond No. 1" that you rented this engine from the Atlas Gas Engine Company, was it? A. Yes, sir.

Q. Now, by that lease you were given an option to purchase that engine at \$3,500, were you not, Mr. Perry? A. Is that what it says there?

Q. That is what it says.

A. I will refer you to the lease of the engine, which is one of the exhibits No. 5, in regard to the charter of this engine.

Q. You refuse to answer the question?

(Deposition of R. A. Perry.)

A. Do I refuse to answer it? No, I do not refuse to answer it. [744]

Q. I would like to have the Reporter read the question.

(The last question and answer repeated by the Reporter.)

A. It states that I was given an option to purchase the engine for \$3,500.

Q. Would \$3,500 be a fair price for the engine at that time, Mr. Perry, according to your idea, or was it an excessive price or a low price?

A. I do not think it was a low price. It was only a stationary gas engine with a cracked cylinder; that was all the engine was worth.

Q. That was all the engine was worth?

A. Yes.

Q. When the dredger "Richmond No. 1" was libeled, did you notify the Atlas Gas Engine Company that it had been libeled with those engines aboard?

A. I did not notify them of anything; I was in Galveston.

Q. Did the Standard American Dredging Company? A. I could not tell you.

Q. Can you discover that in the morning?

A. No.

Mr. LILLICK.—I can tell you that, Mr. Taugher.

Mr. TAUGHER.—If you will stipulate to the thing, it will be all right.

Mr. LILLICK.—Mr. Spilman and I were the attorneys and I notified them.

(Deposition of R. A. Perry.)

Mr. TAUGHER.—If you want to stipulate it was done that will obviate the necessity of making proof as to it.

Q. Did the Standard American Dredging Company undertake to pay any expenses that the Atlas Gas Engine Company might be put to in endeavoring to procure the return of that engine?

A. I do not know what arrangement was made, if any was; I was not here. [745]

Q. Who made the arrangement, if any was made, on behalf of the Standard American Dredging Company? A. I don't know.

Q. Can you discover that in the morning?

A. I will try to discover it.

Q. Did the Standard American Dredging Company agree to pay this amount in case the Court would hold we were entitled to these engines?

A. I don't know anything about it.

Q. If such agreement was made you would know of it, would you not, Mr. Perry?

A. I don't know of everything that transpired in the company when I am away three or four months at a time. I don't know all the details that go on about the office.

Q. I know; but an item of \$3,500, while it might easily escape your attention, I thought possibly you might know about it. Can you discover that in the morning?

A. Well, I will try to find out about that.

Q. Did the Standard American Dredging Company enter into a written lease concerning the en-

(Deposition of R. A. Perry.)

gine that it procured from the California Reclamation Company? A. I think not.

Q. No written lease as to that? A. No.

Q. What rent were you to pay to the California Reclamation Company for the gas engine you received from it?

A. I could not tell you that from memory, but it is charged up on the books, whatever it was.

Q. Can you discover that? A. Yes.

Q. Did the Standard American Dredging Company have any option to purchase that engine?

A. No. [746]

Q. No option to purchase? A. No.

Q. That engine was taken from the "Wink," was it not? A. Yes.

Q. Where was that engine installed on the dredger? A. Installed in the hold.

Q. Where in California, on the waters of California, was that transfer made from the "Wink" to the dredger?

A. I believe the transfer was made in Walnut Grove, although I am not positive as to that.

Q. How was that dredger taken up to Walnut Grove? A. Taken up by a tugboat.

Q. What tugboat took her up?

A. I don't know.

Q. The "Wink" did not take her?

A. I don't know.

Q. Can you discover that too in the morning?

A. Yes.

Q. Now, what was done with the "Wink" while

(Deposition of R. A. Perry.)

the gas engine that had formerly been on the "Wink" was put on the dredger "Richmond No. 1"?

A. She was placed in the slough near Walnut Grove at anchor.

Q. You said this morning that the engine that you received from the California Reclamation Company was much more an engine than the engine that you received from the Atlas Gas Engine Company.

A. I beg to differ with you.

Q. What did you say concerning that? That was my impression of it. I might have been mistaken. Tell us whether or not it was a more valuable engine than the engine you received from the Atlas Gas Engine Company?

A. I said that the engine that we took from the California Reclamation Company, such portions of it as we used on the dredger "Richmond" was identical with the engine that we chartered from [747] the Atlas Gas Engine Company, as we only used a portion, only used such portion of the engine as was required for stationary use, which is identical in size and cast off the same pattern as the one we chartered from the Atlas Gas Engine Company.

Q. Isn't the one you took from the "Wink" a marine engine?

A. It is a marine engine when we got it in the hold of a launch, but we only used the stationary portion of the engine on the dredger "Richmond." We did not use the reversing gear and the mechanism required for reversing the propeller; we did not have any propeller; we did not have any circulating pump;

(Deposition of R. A. Perry.)

but we used an ordinary steam pump to circulate the water in the cylinders of both engines that was already on board the "Richmond."

Q. What did that engine cost the California Reclamation Company when it purchased it?

A. That engine was not purchased as an engine; the whole equipment was purchased, the propeller, the stern bearing, the clutch, the air-tanks, air-whistles, stern sleeve, and all parts pertaining to the marine engine installed in the launch "Wink."

Q. What price did you pay for it? What was the cost?

A. I believe the cost was, installed in the boat complete, for operation on the trial trip, with the trial trip included, was \$7,000.

Q. What was the value of those parts of that engine that were not used on the dredger "Richmond No. 1"? A. When?

Q. When you bought them?

A. I do not know the segregated value of them.

Q. Can you give us an idea?

A. The only way I can give you an idea is that the portion we used on the dredger "Richmond" was exactly the same as the [748] engine that we chartered from the Atlas Gas Engine Company, which should not be worth any more than the one we chartered from the Atlas Gas Engine Company. The engine had a crack in the chamber the same as the one we chartered from the Atlas Gas Engine Company, and I do not consider the engine was any better than the one we chartered from them.

(Deposition of R. A. Perry.)

Q. What do you say as to the value of that engine compared with the value of the portion of that engine that you used—what do you say as to the value of that portion of the engine that you used as compared with the value of the engine that you received from the Atlas Gas Engine Company?

A. I should not think that the value would be any different.

Q. Now, what repairs were made on those engines during the time you were using the dredger at Walnut Grove?

A. I think there was no repairs except the renewing of the crank-shaft, which got in trouble—one crank-shaft.

Q. That is the only repair that was needed on those? A. I think so.

Q. Work those engines all night and day too?

A. Yes.

Q. 24 hours a day?

A. Worked them all the time we could work them.

Q. What is the result of an attempt to get more power from the engine than they can reasonably produce, from a gas engine?

A. They won't produce it.

Q. What is the result on the machinery when you attempt to make the engines carry more, a lot more than they are built to carry?

A. They won't develop any more power than they are built to carry.

Q. Well, won't it slow the engine down?

A. If you put load enough, you can put on load

(Deposition of R. A. Perry.)

enough to stop any [749] engine from revolving.

Q. Before it stops revolving won't it thump?

A. Thump?

Q. Yes.

A. I don't know whether it will thump or not.

Q. Shake the machinery? A. No.

Q. Jar it? A. No; just stop.

Q. Just stop?

A. If you put a big enough power on it you can stop anything.

Q. Between the time it will stop and the time you commence to overload it, how does it act?

A. The cylinders is designed to carry all the power—the cylinder and the other parts of the mechanism are designed to carry all the power you can produce on the gas engine, because you can only produce so much power. It is not like a steam engine where the engine is only designed to carry 100 pounds, for the reason that you may have a boiler that can carry 200 pounds and the engine is only designed to carry 100 pounds, and you have got excess power to draw on; you have not got any chamber that has got the power that you can create on the cylinders; all you can do is to deliver the gas in the cylinder and explode it, and if that won't turn it around, she won't turn it around.

Q. What is the effect of the overloading of the engine? No injury at all?

A. You can't overload the engine beyond the point it is safe to carry in a gas engine.

Q. You cannot overload it? A. No, sir.

(Deposition of R. A. Perry.)

Q. Between the point of what she is designed to carry and the load that will cause her to stop, there is no injury done in between those points?

A. No; we test them on the stand with a brake horse-power and pull them right down to a stop, on a scale. [750]

Q. There is no damage done to the engines?

A. No, not a particle.

Q. Suppose you do not pull them down but just slow them down?

A. You understand what a brake test is on an engine?

Q. Not exactly.

A. Well, I will tell you. I am not going to draw any pictures, but this a fly-wheel on the engine; then there is a brake put on that; then there is water run on that brake; the brake is lined with wood—to keep the brake from burning up; and then there is a screw on this side that is attached to a scale, and they find how much brake horse-power that engine will revolve and keep its speed up on, and that is what determines its horse-power; that is screwed down until the engine is slacked down and cannot go any more; the engine that won't stand that test ain't worth turning out of the shop.

Q. How much pipe did you buy on the Lake Merritt job?

A. Our pipe-line charges on our trial balance show that the charges for the pipe-line, which, by the way, includes the trestle that was driven in Lake Merritt to support the pipe—I want to make this correction

(Deposition of R. A. Perry.)

in the statement that I made heretofore, that the pipe charge was \$6,679.83; I had no segregation of the correct amount of this trestle cost that was driven in the mud to hold the pipe; if I knew the correct cost of that trestle, which is not kept segregated, I could tell you from this exactly what the pipe cost, but I do not know just exactly what that cost. But my recollection is it cost about \$5,000 for the pipe, actual cost of the pipe on the Lake Merritt job—all pipe.

Q. How much a foot would that be, do you know?

A. No, I could not.

Q. Can you tell me the number of feet that you bought? [751]

A. No, I could not tell you that now. I can find it out for you by morning.

Q. Will you tell me that in the morning?

A. Yes, I will try to get it.

Q. How many feet did you take in there with you?

A. I will find that out too.

Q. And the dates upon which the pipe was purchased, and dates of delivery?

A. The only way we can do it is to find it out from the bill.

Q. How much of that pipe did you take with you to Eureka?

A. I could not tell you exactly, because we took up some on the steam schooner, two or three thousand feet, and then we sent some up later on, when we needed it, on another vessel going up there, as we might require it; we had out several pipe-lines at one time, that is, two or three pipe-lines is our cus-

(Deposition of R. A. Perry.)

tom, where we are moving along, so that we can let go of one pipe-line and have another one in the fill so as not to delay the machine from operating; that is the reason for needing that quantity of pipe we used there.

Q. How much pipe did you bring back with you from Eureka? A. I could not tell you now.

Q. Can you find that out?

A. I don't know whether I can do that or not. It is pretty hard to find that out exactly, because we do not keep—

Q. How much new pipe did you buy on the job at Walnut Grove?

A. I could not tell you that correctly now. I think we bought 1,500 or 2,000 feet.

Q. Wear it out up there?

A. Pretty much there, yes.

Q. How much did you wear out?

A. I don't know. [752]

Q. I want to know that, Mr. Perry?

A. The reason we had to buy more pipe up there was because the pipe we had was played out and we had to buy more. I don't know how much we bought.

Q. Will you tell me when you bought it and how much you bought? A. Yes.

Q. When did you finish the job at Walnut Grove, did you say, Mr. Perry?

A. I told you once. I will have to look it up again.

Q. You said it was about the 2d of December, Mr. Perry?

(Deposition of R. A. Perry.)

A. I do not remember. I told you the date once before and it is in the record.

Q. Well, you can find that out in the morning, too.

A. All right.

(An adjournment was here taken until to-morrow, Tuesday, October 3d, 1911, at 10 A. M.) [753]

Tuesday, October 3d, 1911.

R. A. PERRY, cross-examination resumed.

Mr. TAUGHER.—Q. I will ask you, Mr. Perry, to give us a description of the dredger “Richmond No. 1”?

Mr. LILLICK.—I protest at the course of the counsel for the libelant in this cross-examination and notify him now that when the proper time comes, and before the Court, I shall ask for an order taxing the costs of this deposition against the libelant asking for the repetition of testimony already given and for including in the testimony such a large amount of irrelevant, incompetent and immaterial testimony.

Mr. TAUGHER.—Q. The description I want does not concern her machinery so much as to show whether or not she is a vessel. The description of the dredger is for the purpose of showing whether or not she is a vessel.

A. You want to know whether or not she is an apparatus afloat with machinery on her?

Q. I withdraw that question. Would you say, Mr. Perry, that the dredger “Richmond No. 1” is a water craft?

A. I would say that she is a floating dredge.

Q. Would you say that she was a water craft?

(Deposition of R. A. Perry.)

A. I would say that she was a barge.

Q. You would say that she was a barge?

A. Yes, sir.

Q. Would you say that she was a scow?

A. Yes, sir.

Q. A well-built barge or well-built scow?

A. Yes, sir, I think she is a strongly-built scow.

Q. She has a hull and superstructure containing cabin accommodations for all the crew needed to work her? A. Yes, sir. [754]

Q. Her accommodations are enough for about 16 men, are they not?

A. I think she will accommodate 16 men. I don't know exactly.

Q. Is she strongly enough built to navigate on the ocean carrying aboard her machinery and equipment?

A. She did not suffer any damage in being towed from San Francisco to Eureka and return.

Q. How many miles is it from San Francisco to Eureka?

Mr. LILLICK.—Mr. Reporter, note in the record that the claimants again protest at the repetition of the evidence sought from Mr. Perry, and that when the proper time comes the proctors for the claimants will ask for an order taxing the costs of this deposition from the libelant.

A. About 225 miles.

Mr. TAUGHER.—Q. When she made that trip on the ocean 225 miles up to Eureka, and again 225 miles back from Eureka, she carried aboard of her

(Deposition of R. A. Perry.)

all her machinery, did she not, Mr. Perry?

A. She carried such machinery as was installed for the operation of her parts.

Q. When she came back from Eureka did you send back her equipment on board of her, or did you send it by steam schooner?

A. By steam schooner. What I mean by steam schooner is all the parts of the dredging plant not attached, and being a part of the machinery of the dredge itself, that is to say the pontoons, pipes, spare parts and spud timbers were shipped by steam schooner back to San Francisco.

Q. Where were her engines at this time?

A. In the dredge "Richmond" where they belonged—where they were installed originally.

Q. She was carrying her engines at that time?

A. Yes, sir. [755]

Q. She is built to operate afloat and not otherwise, is she not, Mr. Perry?

A. That is the intention of her construction.

Q. That is the only way that she could work, is it not, to any advantage? A. I think so.

Q. With any practicability? A. I think so.

Q. She is never stationary when she is at her work, is she, Mr. Perry?

A. She is anchored to the bottom of the bay by spud timbers, and revolves on this spud which is down, by use of hauling wires attached to anchors, which hauling wires are moved by use of the winding drums on the dredge, in order to make the dredge swing from side to side on the spud.

(Deposition of R. A. Perry.)

Q. I will ask the Reporter to read the question again, and ask you to answer it, Mr. Perry.

(The Reporter reads the question.)

A. You mean by "at work" when she was dredging?

Q. Yes, when she is dredging.

A. It would be possible, and it is done. That is to say, the dredge at times is stationary while dredging. As a matter of explanation I will state that the dredge can be operated, and is operated, during intervals of the day with the cutter revolving and the pump delivering material to the shore when the dredge is not swinging, or moving at all, simply the ladder being lowered down for a portion of the cut before the dredger starts to swing; and also at times when the pipe-line is overloaded the dredge stands stationary until the material in the pipe-line is discharged enough so that the operation of swinging can be continued. The idea of swinging a machine is to feed the material to it. Should the machinery or pump become overloaded with material the swinging is stopped until the [756] dredge clears itself.

Q. How long would that take, ordinarily?

A. In sandy material it is quite common to pump in a long pipe-line, what is known as washing the material out of the line, when overloaded as much as an hour and sometimes an hour and a half.

Q. That is an extraordinary condition when the pipe-line is full, is it not?

A. No, sir; and when we are pumping shells or heavy sand or clay it is a very common occurrence;

(Deposition of R. A. Perry.)

in fact, the operators, have to be very careful not to overload the pipe-line. Under many conditions, I can show you many reports covering the period of the last 30 days, of some of our largest dredgers, that are required to pump water as much as an hour and a half to clear the pipe-line.

Q. When the pipe-line is not plugged and the machine working properly is she not constantly in movement?

A. Except when we swing to the side of the cut. We often stop the machine from swinging on the spud, and lower the ladder down to the depth that we desire to make the swing. The depth we lower the ladder is dependent on the class of material, sometimes 2 feet, sometimes 3 feet, and sometimes 4 feet. The machine is then idle until we get the cut in that corner to the desired depth for the swing, then the dredge is started swinging on the spud.

Q. How many times in a week on a job such as the Lake Merritt job, would you stop the operation of the dredger for such purposes as you have last described?

A. That would depend sometimes on the lever-man, how much they might overload the pipe-line.

Q. How long would the dredge stay stationary when such an operation as that is effected? [757]

A. In the Lake Merritt work the material is very soft, nearly like water, and the time required to stand idle would be much less than it would be in sand and clay, or sand and shells.

Q. There was no sand and shells, or sand and clay,

(Deposition of R. A. Perry.)

in the Lake Merritt job, was there?

A. There was some gravel in Lake Merritt on the north arm.

Q. If you insist on giving explanations of your explanations, if your explanations are such that they require longer explanations than the explanation itself, Mr. Lillick cannot object to the amount of work put upon the Reporter.

A. I understood you to ask me if there was anything but mud in Lake Merritt. I replied there was considerable gravel.

Q. I understand that instead of answering the questions you are evading the answer and are trying to befog the issue. The question is clear enough. If you care to answer it you can. I will ask you again if the "Richmond No. 1," when in operation, is not almost constantly moving?

A. No more so than any other dredger; in fact, less so than any other dredger of greater size.

Q. Of greater size? A. Yes, sir.

Q. That is, the greater the dredger is the greater the movement; is that what you want us to understand by your answer?

A. I mean to inform you that a dredge of such small power is more tender of being plugged up than one of larger size.

Q. What has that got to do with her movement while in operation or being stationary?

A. I have explained that to you before.

Q. Well, explain your explanation, because you do not tell me anything.

(Deposition of R. A. Perry.)

A. I do not know how to explain it any better than I have explained [758] it.

Q. Yes, you do. We are going to have it. We will keep on getting explanations of your explanation until you answer my question. Read the question, Mr. Reporter.

(The Reporter reads the previous question.)

A. A large percentage of the time she is.

Q. What percentage of the time?

A. I could not tell you.

Q. Is it 95 per cent? A. No, sir.

Q. It is not 95 per cent? A. No, sir.

Q. When she is not shut down, because you require to fix the pipe-line or the pontoon line or to make repairs, but when she is in operation, is she not moving 95 per cent of the time that she is operating? A. No, sir.

Q. What percentage would you say?

A. I should say about 75 per cent of the time.

Q. 75 per cent? A. Yes, sir.

Q. Not to exceed 75 per cent?

A. Not in my judgment.

Q. Can the "Richmond No. 1" not move her spuds easier than the ordinary ship can move her anchor?

A. You can move a spud quicker than you can move an anchor.

Q. How long does it take to move a spud?

A. I suppose you can move a spud in 3 or 4 minutes.

Q. Cannot you do it in less than a minute?

A. Do you want me to advise you how long it

(Deposition of R. A. Perry.)

would take simply to lift one spud up?

Q. To lift the spud that you say anchors it to the ground and drop the other one. How long would it take? A. I should say 3 to 4 minutes. [759]

Q. 3 to 4 minutes? A. Yes, sir.

Q. Have you ever seen that operation performed on the "Richmond No. 1"? A. Yes, sir.

Q. You have seen it done in 3 to 4 minutes, have you?

A. That is my judgment about the time it should take to make a set-up. That is what is known as a set-up. I might explain further—

Q. Never mind that.

A. I am going to tell you anyhow.

Q. I am not asking you about a set-up. In that operation you describe she does some swinging in those 3 or 4 minutes?

A. She has to swing to set up and make the operation. That is why I tell you it takes from 3 to 4 minutes.

Mr. LILLICK.—You have a right to make your explanations, Mr. Perry.

Mr. TAUGHER.—Q. I am not asking you that. How long does it take to lift the spud and drop anchor?

Mr. LILLICK.—Mr. Perry, you may answer the question and then tell why if you like.

A. 3 to 4 minutes.

Mr. TAUGHER.—Q. Can it be done in less than that time?

A. I have got to ask you a question.

(Deposition of R. A. Perry.)

Q. Never mind. Just answer my question. I am not answering questions.

A. I have got to ask you a question to know what you want.

Q. All right, you can ask that.

A. Do you wish me to advise you how long I think it will take to lift a spud with the machinery stationary?

Q. I am talking about "Richmond No. 1."

A. A spud on "Richmond No. 1" with the dredge remaining stationary, [760] and drop that spud again with the dredge remaining stationary?

Q. Not the same spud. I do not want that.

A. Do you want us to lift both spuds and let her float away, because that is what would happen?

Q. No. Lift one spud and drop the other.

A. Do you wish to know how long it will take to lift one spud and drop the other while the dredge will remain stationary?

Q. All right, tell us that.

A. I think the spud can be lifted and another dropped, if the dredge does not move at all, in 2 minutes.

Q. Can it be done within a half a minute?

A. No, sir.

Q. Can it be done in a minute on the dredger "Richmond No. 1"? A. I do not think it could be.

Q. You say it will take 2 minutes with that operation.

A. Yes, sir, not moving the dredge at all.

Q. How long would it take to perform the same

(Deposition of R. A. Perry.)

operation, with the dredge moving?

A. From 3 to 4 minutes.

Q. How long would it take to lift the spud and let her float away?

A. You ought to be able to lift the spud in a minute and a half.

Q. A minute and a half? A. One spud.

Q. How much less than a minute and a half can it be done on the dredger "Richmond No. 1"?

A. If you did not have any trouble it might be done in a minute and a quarter.

Q. Could it be done in a half a minute?

A. I think not. It might be done in some specific time, in less time than stated, [761] provided the spud did not stick, or we have no trouble with lifting the gear, which often occurred in fact, we have to heave 3 or 4 times many times for 4 or 5 minutes before we can get the spud started out of the mud.

Q. Would you like to explain that explanation any further?

A. No, sir. I do not want to explain any further. I want to say why sometimes it takes the spud longer than at other times.

Q. Mr. Perry, where did you get that blue-print of the "Richmond No. 1" that you have introduced in evidence?

A. We have the tracings of the dredge, or did have them in our office.

Q. Where did you get it?

A. Mr. Plummer who made the drawing furnished it to us.

(Deposition of R. A. Perry.)

Q. Mr. who?

A. Mr. Plummer, who was our engineer, who formerly made the plans when in business, with a Mr. Wright, running an engineering office. This firm made the plans for the Richmond Dredging Company. After we chartered the dredge we asked that these plans be furnished us so that we could have the benefit of them in the operation or repairs of the dredge boat.

Q. Did Mr. Cutting and the Richmond Dredging Company know that you had a blue-print of the dredger?

A. I think we asked them to furnish us with whatever they had, and they told us to get them off of Wright & Plummer who had the tracings, and we could get the blue-print made from the tracings.

Q. You have used that dredger "Richmond No. 1" longer than the Richmond Dredging Company, its owner, have you not?

A. I could not say. I do not know how long they have used it.

Q. Do you know when the dredger was built?

A. No, sir.

Q. You have a blue-print and various other things. Did the [762] man who built the dredger tell you how long it had been built?

A. I did not ask him.

Q. Don't you know how long it has been built?

A. I don't know when it was built.

Q. You don't know when it was built?

A. I don't know when it was built.

(Deposition of R. A. Perry.)

Q. Did you ever try to buy the "Richmond No. 1"?

A. We had several discussions with the Richmond Dredging Company about doing some work for them over at Richmond, and taking the dredger in part pay, and so on.

Q. Did you not try to buy the dredger "Richmond No. 1" before it was completed? A. Never.

Q. Did you ever have any negotiations for the purchase of that dredger before she was completed?

A. No, sir.

Q. When did you first enter into any negotiations concerning the purchase of that dredger?

Mr. LILLICK.—I enter another protest, Mr. Reporter, against the course of this cross-examination.

A. We had some negotiations in the spring of 1911, and furnished certain blue-prints and estimates, and made borings at Richmond.

Q. I am asking you about the dredger "Richmond"?

A. That is what I am trying to tell you if you will allow me to proceed with it.

Q. All right. We will get an explanation of your answer, then.

A. We had a conversation with Mr. Cutting and Mr. Wernse about doing some dredging for them at Point Richmond. We went over and made borings, and made maps, and furnished them to the Richmond Dredging Company, and Mr. Cutting, maps of the [763] proposed work and estimate of our cost of the same.

(Deposition of R. A. Perry.)

Q. This was a year or two before that I am talking of; the first time?

Mr. LILLICK.—Go on, Mr. Perry.

A. We made them a proposition to take the dredger as part pay for the work.

Q. Have you finished?

A. I have finished that answer.

Q. How many other dredging companies are there on the Pacific Coast that you know of, besides the Richmond Dredging Company and the Standard American Dredging Company?

A. Probably about 15.

Mr. LILLICK.—Mr. Reporter, enter another protest as to the cross-examination on the ground of its irrelevancy, and a notice to the proctor for the libellant that we will make a motion to tax the costs of the deposition to the libellant.

Mr. TAUGHER.—I wish to enter a protest against the number of protests that the proctor for the claimant is causing to be entered on the record, and ask that all those protests be charged against him.

Q. I had quit that line before I had quite completed it. When did you first make any offer either directly or indirectly or attempted to purchase the dredger "Richmond No. 1" from the Richmond Dredging Company? A. I do not remember.

Q. Was it in the year 1908? A. No, sir.

Q. You did not make any offer, or attempt to purchase her, or have any negotiations concerning her purchase in the year 1908?

(Deposition of R. A. Perry.)

A. Not to my knowledge, not that I remember anything about.

Q. Neither you, nor your company, the Standard American Dredging Company?

A. Not that I am aware of. [764]

Q. Did you not see that dredge before she was completed, the dredge "Richmond No. 1"?

A. Not that I remember now.

Q. You don't remember of ever having seen her in the course of construction?

A. Not that I remember about at all.

Q. Now, Mr. Perry, I wish you would answer that question that I asked you yesterday, that Mr. Lillick protested against. And I ask the Reporter to read it. I will withdraw that question now and ask another. How many companies are there operating hydraulic dredgers on the Pacific Coast?

A. Would you like to have me—

Q. Just how many?

A. I will have to figure it up.

Q. All right, figure it up. If you do not know say so.

A. I do not know it without figuring it up.

Q. All right.

A. Will you please read the question, Mr. Reporter? (The Reporter reads the question.) Ten.

Q. Of those ten, the Richmond Dredging Company is one, and the Standard American Dredging Company is another?

A. I have not included the Richmond Dredging

(Deposition of R. A. Perry.)

Company. You must correct that and make it eleven.

Q. How many of these companies operate more than one dredger? A. One hydraulic dredger?

Q. Hydraulic dredger. I am not talking of anything else but hydraulic dredger. A. Five.

Q. Five operate more than one? A. Yes.

Q. What are the names of those five companies?

A. The Tacoma Dredging Company; the Puget Sound Bridge & Dredging Company; the North American Dredging Company; the Standard American Dredging Company and the San Francisco Bridge Company. [765]

Q. Now, the Standard American Dredging Company is your company? A. I am president of it.

Q. You are president of that company?

A. Yes, sir.

Q. Have you any connection with the Tacoma Dredging Company that you have mentioned?

A. No, sir.

Q. Have you any stock in that company?

A. No, sir.

Q. Have you any in the Puget Sound Bridge & Dredging Company? A. No, sir.

Q. Has the Standard American Dredging Company? A. No, sir.

Q. In the North American?

A. I have, and have had for 6 or 7 years \$39,000 worth in the North American Dredging Company.

Q. What is the capitalization of that company?

A. \$1,000,000.

(Deposition of R. A. Perry.)

Q. How much of the stock is issued?

A. \$435,000 of par value.

Q. And how much of that stock have you?

A. \$39,000.

Q. How much of the capital stock of that company have you? A. In shares?

Q. Yes. A. 395.

Q. 395,000 shares?

A. No, sir; 395 shares, or \$395,000 worth at par value.

Q. \$395,000 worth?

A. No, sir; I mean \$39,000 worth.

Q. How much of it is issued?

A. \$435,000 worth.

Q. Then, you have not more than one-tenth of that company? A. Less than a tenth.

Q. Less than a tenth interest? A. Yes, sir.

Q. Has the Standard American Dredging Company any interest in that company?

A. It has no stock whatever.

Q. Who is the largest stockholder in the North American Dredging Company?

A. I guess I am the largest single holder. [766]

Q. The largest single stockholder?

A. Yes, sir.

Q. Who are the officers of that company?

A. C. I. Wright, President; C. F. Guthridge, Vice-president. I do not know who the Secretary and Treasurer are. At this time I do not know who they are.

Q. How many dredgers do they own? A. Five.

(Deposition of R. A. Perry.)

Q. They own five dredgers?

A. Yes, sir.

Q. They work in connection with you. You control those dredgers, practically, do you?

A. No, sir; I do not control the dredgers.

Q. No bids are made without your knowledge on any large jobs by the North American Dredging Company, are they?

A. They have made bids without my knowing anything about it. I am not everywhere at one time.

Q. The Standard American Dredging Company and the North American Dredging Company do not compete for the same work, do they?

A. No, sir.

Q. They operate five dredgers, do they?

A. Yes, sir.

Q. Five hydraulic dredgers? A. Yes, sir.

Q. How many dredgers does the Standard American Dredging Company operate, own, rather—own and operate? A. Hydraulic dredgers?

Q. Yes.

A. They own two hydraulic harbor dredgers and one hydraulic hopper dredge.

Q. Is that all?

A. That is all the hydraulic dredgers.

Q. That is all of the hydraulic dredgers the Standard American Dredging Company either owns or controls or operate?

A. Yes, sir; that is all. There is one being built but that is not done yet. [767]

Q. How many does the San Francisco Bridge

(Deposition of R. A. Perry.)

Company operate?

A. They are operating one and are building another one at the present time.

Q. How many do they own? A. Two.

Q. That would be two? A. Yes, sir.

Q. Have you any stock in the San Francisco Bridge Company? A. No, sir.

Q. Or working arrangements with them?

A. No, sir.

Q. They only work one dredger at the present time?

A. That is all that is working at the present time. There is another one that will be started on the San Pablo Government work in a short time.

Q. Are there any other hydraulic dredging companies in California?

A. I think the ones I have named are the principal ones. There might be one or two dredgers around. There are additional dredgers in Portland that I did not describe that we do not have any interest in. I know there are two hydraulic dredgers up there; but I do not know their owners; some mill company owns them, in Portland, Oregon.

Q. What dredging companies in California operate hydraulic dredgers other than the Standard American Dredging Company and the North American Dredging Company and the San Francisco Bridge Company which operates one dredger?

A. The Pacific Coast Dredging & Reclamation Company.

(Deposition of R. A. Perry.)

Q. Where are they located and how many do they operate?

A. One; they are located at San Francisco Bay.

Q. What is the name of that company?

A. The Pacific Coast Dredging & Reclamation Company.

Mr. LILLICK.—We enter another protest, Mr. Reporter, at the cost of the cross-examination.

Mr. TAUGHER.—Q. How many dredgers do they operate? A. One. [768]

Q. Small or large? A. Small.

Q. Very small?

A. A 12-inch machine, the same size as the "Richmond."

Q. Is it in operation now, do you know?

A. I could not say. I have been away from here for a couple of months. I do not know what is doing.

Q. Have you any interest in that dredging company? A. No, sir.

Q. What other company?

A. The Puget Sound Bridge & Dredging Company.

Q. Is that in California?

A. Did you say in California?

Q. I said in California only.

A. The American Dredging Company.

Q. Where is that located?

A. In San Francisco.

Q. Have you any interest in that? A. No, sir.

Q. How many dredgers do they operate?

(Deposition of R. A. Perry.)

A. They operate at the present time one hydraulic dredge; they had another one but it burned up.

Q. A small or large one?

A. A good power dredge, with 20-inch capacity, and with about 1,000 horse-power total on the dredge.

Q. A new or old dredge?

A. About 3 or 4 years old.

Q. Looked on as an old boat now?

A. Not necessarily. The life of a dredge boat is as much as 20 years. The San Francisco Bridge Company has one running 20 years now, doing a job for the United States Government in Oakland Creek, and doing better work than it ever did.

Q. They have always operated their own dredge; they have not leased it out to anyone else to operate for them?

A. They have rebuilt the dredger as it might be required. When the boiler is played out, they put in a new one. The same engines are operating that came in her when she was constructed, the same [769] spud engines are there as were in her when she was constructed. I personally operated this dredge 20 years ago.

Q. Working for someone else at that time?

A. Yes, sir.

Q. Working for the owners of the dredge?

A. Yes, sir.

Q. You were employed by the owners at that time?

A. Yes, sir.

Q. Different care has been taken of that dredger than has been taken of "Richmond No. 1"?

(Deposition of R. A. Perry.)

A. I could not say as to that.

Q. "Richmond No. 1" is practically a pile of junk now, is she not? A. Not from my point of view.

Q. Without those new engines she is practically useless?

A. That depends on how you look at it; that is not my point of view.

Mr. LILLICK.—Q. State your point of view.

A. I will say that the engines are as able to do the work now as when we chartered her in 1909.

Mr. TAUGHER.—Q. You will not consent to coming over with us and starting those engines so that a test can be made of them?

A. I have to go away on Wednesday, the 4th of October, to Honolulu.

Q. Will you consent on behalf of the Standard American Dredging Company that an examination of this dredge "Richmond No. 1" be made by competent experts in the presence of your representatives for the purpose of testing the power and condition of those engines at the present time?

A. I shall have to refer that to our attorneys, as they are handling that end of the case. I do not want to make any statements regarding that part of it.

Q. You know, if you are willing, they will offer no objection, don't you, Mr. Perry?

A. No, sir, I do not know that.

Q. You don't know that? A. No, sir. [770]

Q. You don't know, if you say it is satisfactory, that it will be done?

(Deposition of R. A. Perry.)

A. I prefer to leave that to the judgment of our attorneys, what they want to do.

Q. You do not want an examination to be made—you are not willing to have an examination made for the purpose of determining the correctness of your testimony?

A. I prefer to leave the matter as it now stands. I believe that our attorneys have had that up with you and have agreed on some method of inspection, and so on.

Q. Mr. Perry, your attorneys this morning handed me a letter, as proctor for the Richmond Dredging Company, which states in effect that they will consent to an examination being made of the dredger "Richmond No. 1" and her engines.

Mr. LILLICK.—We have no objection to the letter going in now, but we do object to an excerpt from the letter being read into the record.

Mr. TAUGHER.—Q. I will hand you the letter and let you read it.

Mr. LILLICK.—Q. Read it into the record, Mr. Perry.

A. Very well. (Reading:)

"October 2, 1911.

J. L. Taugher, Esq.,
Mills Building,
San Francisco.

Dear Sir:

Richmond Dredging Co. v. Dredger Richmond No. 1.

In response to your oral request for a stipulation by us on behalf of the Standard American Dredging

Company that your client, the Richmond Dredging Company, may within the next thirty days make an examination and working test of the dredger Richmond No. 1, its machinery and equipment (especially its [771] engines) now in the custody of the United States Marshal under attachment in the case of Standard Dredging Company v. Richmond Dredging Company, we have to say:

We have heretofore written a letter to the Marshal permitting you and your client to examine the dredger and its equipment but without dismantling or operating the same. This is as far as we are willing to go in this direction. While we have no desire to hinder you in procuring any relevant and material evidence in the case, we are compelled to decline entering into the stipulation that you now propose for the following reasons:

1. A working test such as you propose would necessarily involve some risk to the dredger and its equipment; and we are not willing in the slightest degree to impair the security of our writ of attachment by consenting to any relaxation of the Marshal's duty safely to keep the attached property to abide by the judgment of the Circuit Court.

2. The dredger has been idle for more than eight months, and a fair test of its working order and efficiency could now be made only after thorough preparation by men desiring to make it work, and to that end adjusting and adapting its several parts until the desired purpose should be accomplished. Your purpose is to demonstrate that the dredger can

(Deposition of R. A. Perry.)

be made not to work; and we admit now that that is true of this or any other dredger.

3. Under no possible construction of the pleadings in this case can the present condition of the dredger, her engines or other equipment, be considered as issue. There are but two issues: For what length of time is the S. A. D. Co. required to pay the rental of \$50.00 a day; and, is your client entitled to come into a court of admiralty to seek to use its process for the purpose of obtaining property [772] which does not belong to your client.

Yours very truly,

J. S. SPILMAN.

IRA S. LILLICK."

Mr. TAUGHER.—Q. That letter was prepared under your instructions, Mr. Perry?

Mr. LILLICK.—I should like to state that Mr. Perry was not consulted about that letter at all. It was dictated and signed and a copy of the same handed to him just before it was handed to you, and he was reading it over at the same time that you were.

Mr. TAUGHER.—Q. This describes your attitude in the matter correctly, does it not, Mr. Perry?

A. I think that describes the position that the attorneys desire to have taken in the premises. I have turned the matter over to them to handle now as it may seem wise to them.

Q. You will not consent to an examination of this dredger being made now for the purpose of testing its repairs, for the purpose of testing the repairs of

(Deposition of R. A. Perry.)

those engines with witnesses on your behalf being present at the time of the examination, and on our further undertaking that any damage that will be done on the examination of the dredger by us in making that examination we will stand ourselves.

Mr. LILLICK.—On behalf of Mr. Spilman and myself, I desire to state that we have no objection to the examination of the dredger and the machinery on the dredger, if the engines and machinery are not started; in other words, we will give you the fullest opportunity to examine not only the dredger but the machinery, if the engines are not started, and this purely because of the possible damage that may result from starting the engines.

Mr. TAUGHER.—Q. That is, our examination cannot go beyond the outside view of the engines or the machinery. Read the question to Mr. Perry again, and ask him to answer it. [773]

(The Reporter reads the question.)

A. I will leave the matter to be arranged between our attorneys and yourselves in any way that seems proper.

Q. Then you approve of this letter, Mr. Perry?

A. I have to stand by whatever action my attorneys see fit to take in the matter; that is what I am paying them for.

Q. I want to know how you feel about it.

A. I cannot very well hire a superintendent and tell him how to do the job.

Q. Now, Mr. Perry, are you not the biggest dredgerman in the country—on the Pacific slope?

(Deposition of R. A. Perry.)

A. Sometimes I feel like I am the smallest one.

Q. I had better change that slightly; The Standard American Dredging Company and the other companies in which you are interested do more dredging work than all the other companies on the Pacific Coast, do they not? A. I think not.

Q. Just think it over for a moment before you answer. A. I should say not.

Q. The Standard American Dredging Company and the other dredging companies in which you are interested as a stockholder do more dredging work than all the other companies on the Pacific Coast combined? A. I should say not.

Q. You should say not? A. Yes, sir.

Q. Which is the biggest dredging company on the Pacific Coast?

A. I believe the Atlantic Gulf & Pacific Company are known as the largest dredging company, having offices in the Monadnock Building, in this city.

Q. Have they any dredgers out here on this coast?

A. No, sir, but they control the companies that do have—own the [774] companies that do have.

Q. What companies do they own that have them?

A. The Puget Sound Bridge & Dredging Company, and I believe the San Francisco Bridge Company.

Q. The San Francisco Bridge Company only operates one dredger, does it not?

A. At present. They have another one under construction.

Mr. LILLICK.—Now, Mr. Reporter, we enter an-

(Deposition of R. A. Perry.)

other protest against the repetition of the cross-examination by proctor for the libelant, and the course of the cross-examination, and notify him that we will at the proper time apply for an order that the cost of his procedure be taxed against the libelant.

Mr. TAUGHER.—I am willing to stipulate, Mr. Reporter, that a similar protest be considered as made by Mr. Lillick after every three questions.

Mr. LILLICK.—That is good.

Mr. TAUGHER.—Q. Your companies do more work in California, the Standard American Dredging Company and the other dredging companies that you are interested in do more dredging work in California than all the other dredging companies put together, do they not?

A. All what other dredging companies?

Q. Operating in California. A. No.

Q. All the other hydraulic dredgers operating in California, I mean, or the waters thereof?

A. I would not be sure that they do more than all the rest put together.

Q. You would not be sure of that?

A. No, I would not be sure about it.

Q. There was a Government job to be done in the Stockton Channel and the Mormon Slough, the bids for which were advertised to be [775] opened on August, 1910, were they not?

A. I am not familiar that that was the correct date. There was a job advertised about that time.

Q. You knew that the Standard American Dredg-

(Deposition of R. A. Perry.)

ing Company put in a bid on that job, did you not?

A. I believe they did.

Q. You know, also, that the Richmond Dredging Company put in a bid on that job, do you not?

A. Yes, sir.

Q. Do you know who was the lowest bidder?

A. I think the Richmond Dredging Company was the lowest bidder.

Q. Were not those bids opened on the 12th day of August, 1910? A. I don't remember the date.

Q. How long after the first bids were opened on that Government job at Stockton did you notify the Richmond Dredging Company that you required the return of your dredger "Oakland"?

A. I don't know how many days it was before the company notified them that they wanted the dredger "Oakland" returned.

Q. Don't you know it was within three days?

A. I don't remember now. I have no records here.

Q. Don't you remember, as a matter of fact, it was the very next day?

A. No, sir, I don't remember that.

Mr. LILLICK.—Have you the letter, Mr. Taugher? And that will fix it.

Mr. TAUGHER.—The letter is in evidence.

The WITNESS.—Let me see the letter and then I can tell you.

Mr. TAUGHER.—Q. I am going to refresh your memory.

(A recess was taken until 1:30 P. M.) [776]

(Deposition of R. A. Perry.)

AFTERNOON SESSION.

R. A. PERRY, cross-examination resumed.

Mr. TAUGHER.—Q. Did you write that letter, Mr. Perry? (Handing Claimant's Exhibit 81½ to the witness.) A. Yes, sir.

Q. This is a letter dated August 12th, 1910, marked "Claimant's Exhibit 81½." Can you tell me how soon after the bids on the Stockton job were opened was this letter written?

A. I don't remember the dates of the bids of the Stockton job without looking it up in my records.

Q. Don't you know this was done within a day after the first bids were opened on that Stockton job?

A. No, sir, I don't know.

Q. You don't know?

A. No, sir, I don't remember the date that the bids on the Stockton job were opened.

Q. Did the fact that the Richmond Dredging Company put in a lower bid than the Standard American Dredging Company on that job have anything to do with your terminating the lease of the dredger "Oakland"? A. No, sir.

Q. Did you not say to Mr. Franks about the time that the bids were opened for that job at Stockton that Cutting nor the Richmond Dredging Company would not do that job for they could not get their dredger? A. No, sir.

Q. Did you have a conversation with Mr. Franks at all? A. Not that I know of.

Q. Never had any conversation with Mr. Franks in or about the month of August, 1910?

(Deposition of R. A. Perry.)

A. What about?

Q. In relation to this job at Stockton. [777]

A. Before the Stockton bids were opened?

Q. After the Stockton bids were opened.

A. I don't remember anything about having any conversation with Mr. Franks about the Stockton job.

Q. Neither before or after the bids were opened?

A. No, sir.

Q. Never had any conversation with him at all?

A. Not about the Stockton job that I remember anything about.

Q. Do you remember saying anything to him about the Richmond Dredging Company or Mr. Cutting?

A. Not that I remember of.

Q. Was there any connection between the fact that the Richmond Dredging Company put in a lower bid for this job and your notice to the Richmond Dredging Company to deliver up the "Oakland"? A. No, sir.

Q. In how many places is the Standard American Dredging Company operating dredgers?

A. At this time?

Q. Yes. A. Four.

Q. Four places? A. Yes, sir.

Q. Where are those four places?

A. San Francisco Bay.

Q. How many dredgers in San Francisco Bay?

A. At the present time, one.

Q. One dredger here only. How many dredgers have you over at Oakland?

(Deposition of R. A. Perry.)

A. Only one operating now; one is shut down.

Q. When did it shut down?

A. About a month ago.

Q. Where else?

A. San Pedro or Los Angeles Harbor.

Q. What is the name of the one here in San Francisco Bay?

A. The dredge we are operating in San Francisco Bay is not a dredge owned by the Standard American Dredging Company but is a [778] chartered dredge.

Q. Chartered from whom?

A. From the American Dredging Company.

Q. Chartered from the American Dredging Company? A. Yes, sir.

Q. Are you a stockholder of the American Dredging Company? A. No, sir.

Q. What is the name of that dredger?

A. It is known as the "Uncle Sam."

Q. Is that a large dredger?

A. Yes, sir; it is a clam-shell dredger, you understand.

Q. How many operating in San Pedro?

A. Two.

Q. Two dredgers; what are they?

A. One known as the "Oakland," a hydraulic dredger; and one a clam-shell dredge known as the "San Francisco."

Q. How big a dredge is the clam-shell?

A. It is a large-size dredge, having a six-yard bucket.

(Deposition of R. A. Perry.)

Q. What is the value of her as compared to the "Oakland"?

A. She is not worth more than \$75,000 or \$80,000.

Q. Where else are you operating?

A. San Diego.

Q. How many dredgers there? A. One.

Q. What is the name of it?

A. Known as the "South Bay."

Q. How big a dredge is that?

A. A 20-inch dredge.

Q. 20-inch hydraulic dredge? A. Yes, sir.

Q. Where else are you operating?

A. Pearl Harbor, Hawaii, T. H.

Q. How many dredgers there?

A. One at present.

Q. How many have you there? A. One.

Q. Just have one dredger there?

A. Yes, sir.

Q. Are you operating any place else; is the Standard American [779] Dredging Company operating any place else? A. No, sir.

Q. Is any dredging company in which you are an officer operating any place else? A. Yes, sir.

Mr. LILLICK.—Enter another protest, Mr. Reporter, to the character of the cross-examination, with notice that I shall ask for an order to tax the costs of the deposition to the libelant.

Mr. TAUGHER.—Q. What is the name of that dredging company?

A. The North American Dredging Company, of Texas.

(Deposition of R. A. Perry.)

Q. Any other company? A. No, sir.

Q. What officer are you in the North American Dredging Company of Texas? A. President.

Q. What is it capitalized at? A. \$600,000.

Q. Are there any other dredging companies in which you are a director which are operating any other dredgers? A. No, sir.

Q. Any other dredging companies in which you are a stockholder? A. Yes, sir.

Q. What are they?

A. The North American Dredging Company.

Q. What is that capitalized at? A. \$1,000,000.

Q. You are the largest stockholder in that company, are you not?

A. Yes, sir; I have about \$39,000 worth of stock.

Q. \$39,000 par value? A. Yes, sir.

Q. That is capital stock of the par value of \$39,000. A. Yes, sir.

Q. What is that \$39,000 worth?

A. I don't know.

Q. Approximately?

A. I think it is worth about 25 per cent of its par value.

Q. What is the value of the contracts that you are working on in San Francisco Bay?

A. What do you mean by the value?

Q. Not the value, but the amount of the contract price of the work that you are doing in San Francisco? [780]

A. That is indeterminate. We get paid in the cut for the amount of the material that we finally place

(Deposition of R. A. Perry.)

on the levee, and the quantity required to construct the levee cannot be told in advance of completion of said levee.

Q. What is the estimated value of that work?

A. The city engineer of Oakland estimated that it would require 210,000 cubic yards at 17 cents.

Q. That is all the work you are doing in San Francisco Bay, is it?

A. All the work I am doing in San Francisco Bay is the construction of this levee that I have mentioned.

Q. I mean you or the Standard American Dredging Company, or the companies you are allied with?

A. Yes, sir.

Q. That is all the work you are doing?

A. Yes, sir.

Q. In San Diego what is the estimated price of the contract to be done by you there?

A. \$120,000.

Q. What is the contract price of the work to be done at San Pedro?

A. Do you mean the aggregate contracts at San Pedro?

Q. Yes.

A. I cannot tell you without figuring them up.

Q. Approximately, or if it will not take too long to figure, you had better figure it.

A. \$400,000 or \$500,000.

Q. Between \$400,000 and \$500,000?

A. Yes, sir.

Q. How much does the work at Pearl Harbor

(Deposition of R. A. Perry.)

amount to? A. When?

Q. What is the estimated contract price of the work that you have in Pearl Harbor?

A. Uncompleted?

Q. Yes. A. About \$100,000.

Q. I did not say uncompleted. I thought you said when completed. We will reform that question, Mr. Perry. What is the contract price of the work that you are engaged on in Pearl Harbor?

A. \$500,000. [781]

Q. What is the contract price of the work being done by the North American Dredging Company at this time?

A. A couple of hundred thousand dollars.

Q. Now, Mr. Perry, did you discover when you completed the Walnut Grove job?

A. December 2, 1910.

Q. What were you doing with the dredger "Richmond No. 1" after December 2d, 1910?

A. Repairing her. Getting ready to turn her back to the Richmond Dredging Company.

Q. When did you put men aboard her to make such repairs?

A. The men were never discharged entirely from Walnut Grove until we turned her back.

Q. Until what?

A. We kept men aboard of the dredger all the time, from the time we finished at Walnut Grove until the time we delivered her at the Richmond Canal Company's property at Richmond, California.

Q. How many men did you keep aboard of her?

(Deposition of R. A. Perry.)

A. I could not tell you.

Q. About how many? A. I don't know.

Q. What repairs were being made by those men?

A. General repairs to the dredger.

Q. Can you mention any of the repairs that were made by them?

A. I could not give you specific repairs because I was not there, and not in charge of the work. Mr. Knight was in charge of the work.

Q. What kind of men were they? Were they mechanics or carpenters or what were they—the men you left aboard of the dredger?

A. They were machinists and carpenters, dredgemen.

Q. Did one man combine in himself all those things, machinist, carpenter and dredgeman, or were there at least three men aboard? [782]

A. There were a number of men aboard in their own capacity.

Q. Were there at least three?

A. More than that.

Q. Can you tell me who those men were?

A. No, sir; I don't know their names, all of them. I know Mr. Knight was there a large portion of the time looking after the work. That is the only name that I know of, without looking up the payrolls.

Q. Would Mr. Knight know the men who were on there? A. Yes, sir.

Q. Then you were not doing any work with the "Richmond No. 1" subsequent to December 2, 1910?

(Deposition of R. A. Perry.)

A. We did not do any dredging after December 2, 1910.

Q. When were the bids for the dredging of the Key Route Basin advertised?

A. I don't remember.

Q. About what time?

A. I think some time in December, for the levee.

Q. What is the estimated amount of the work that they wanted bids for?

A. The engineer estimated there were 210,000 yards in the front levee, and 100,000 in the Fourteen Street Levee.

Q. How much did you say? Give me those figures again.

A. Will you read my answer, Mr. Reporter? (The Reporter reads the answer.) I might add, the city engineer of Oakland.

Q. Were you the successful bidder for that work?

A. No, sir.

Q. Who got the job?

A. The bids were all rejected.

Q. The bids were all rejected?

A. I might correct that. An attempted award was made to either McEnerney or the Pacific Coast Dredging Company, I don't remember which; one and the same outfit; and he made an error in his bid and bid away below the [783] cost of the work and forfeited the bid bond that he put up. Then the work was readvertised.

Q. Who was the successful bidder on the second advertising? A. We were the low bidders.

(Deposition of R. A. Perry.)

Q. You have it? A. Yes, sir.

Q. What is the estimated amount of that contract?

A. I have told you the city engineer estimated it at 210,000 yards at 17 cents and 100,000 yards at 21 cents.

Q. How much work is to be done in connection with that work by the suction dredger? A. None.

Q. In connection with the filling to be done at the Key Route Basin?

A. That is another contract.

Q. How much does that amount to?

A. Its estimated amount is about 3,000,000 yards.

Q. Has that contract yet been let?

A. Yes, sir.

Q. Who was the successful bidder for that work?

A. The Standard American.

Q. The Standard American Dredging Company?

A. Yes, sir.

Q. When were those bids opened?

A. I think it was in January some time.

Q. January of what year? A. 1910.

Q. 1910? A. 1911.

Q. You still had the dredger "Richmond No. 1" in your possession at that time, and you were not using her, were you, Mr. Perry?

A. I think we had returned her at that time to the Richmond Dredging Company, had we not? What is the date of the return of her?

Q. You have not returned her at all, as I know. I believe you wrote us a letter along about the 3rd of February that you were going to return her to

(Deposition of R. A. Perry.)

us, or something of the kind, but we [784] received no letter from you in relation to that matter until February 11th. Just one other question in relation to that Stockton job. Who was the lowest bidder on that Stockton work when the bids were first called for?

A. I believe the Richmond Dredging Company were.

Q. The specifications were changed, were they not, then, subsequent to the putting in of those bids?

A. I believe a portion of them were changed.

Q. Then who subsequently got the contract for that work?

Q. I think Mr. Franks got the contract.

A. I don't know whether it was in his name or some dredging company that he is interested in; it was executed by a clam-shell dredge.

Q. Who took those photographs of the dredger?

A. Which dredger?

Q. "Richmond No. 1" as she was moving across from the estuary to Lake Merritt?

A. Mr. Connor.

Q. Mr. Connor made them?

A. I believe so.

Q. Were you present when they were made?

A. I don't remember about being present.

Q. Can you tell us what repairs were made on the dredger "Richmond No. 1" after December 2d, or how long those repairs took? A. What year?

Q. After December 2d, 1910, after you finished the Walnut Grove job?

(Deposition of R. A. Perry.)

A. We were repairing the dredge until the dredge was returned.

Q. Can you tell us what repairs were made on the dredge?

A. No, sir. Mr. Knight can tell you all about that.

Q. Then, you don't know whether any repairs were made on that [785] dredger after that time or not?

A. Yes, sir; I know the repairs were made because I have seen the bills and payroll for it.

Q. Were you on the dredger after December 2d, 1910? A. Yes, sir.

Q. Once.

A. Yes, sir. When she was laying near the Atlas Gas Engine Works in Brooklyn Basin.

Q. Where is that? San Francisco Bay?

A. In Oakland Estuary, known as East Oakland.

Q. You were aboard of her then? A. Yes, sir.

Q. When was that visit made by you to the "Richmond No. 1"?

A. Sometime in December when we were working on the dredger "Oakland," we were repairing her at the same time; we had a big gang of men there. I passed over from the dredger "Oakland" and went aboard the "Richmond."

Q. How long did you stay aboard the "Richmond"?

A. Probably not more than 20 minutes.

Q. How many men were working on the "Richmond" at that time? A. Three or four men.

(Deposition of R. A. Perry.)

Q. Do you know what they were doing?

A. I don't know just what they were doing, now. I don't remember.

Q. Was that the time they were removing the engines you put aboard and were putting back the old engines?

A. No, sir. They were repairing around there. I don't know what they were doing.

Q. Did you give any directions as to the repairs to be made on her?

A. No, sir, only in a general way. I told Knight to repair the dredge and put her in shape to return.

Q. Did you tell him to paint the engines?

A. I don't know whether I told him to paint the engines. [786] I think we told him to clean her up, paint up the house, and send her home so that she would look like something.

Q. Were the engines painted on the outside?

A. I don't know whether they were or not. I have never seen them since.

Q. Have you the bills for the repairs made on the engines subsequent to the Walnut Grove job that you were to give this morning? You were to get them last night.

A. Subsequent to the Walnut Grove job?

Q. Yes.

A. They are part of the evidence now turned in.

Q. They have not been returned in yet?

A. Yes, sir.

Q. When?

A. Oh, subsequent? Subsequent to the repairs of

(Deposition of R. A. Perry.)

the Walnut Grove job?

Q. You were to get the bills of that today and the men who made the repairs.

A. I have not been able to segregate those bills, but I am informed it was about \$300.

Q. Who knows what they were?

A. Mr. Knight will know exactly what they were.

Q. Mr. Knight? A. Yes, sir.

Q. You cannot tell us what repairs were made on those engines? A. Not at that time, no.

Q. After you finished doing dredging work at Walnut Grove, you said some repairs were made on the old engines, were they not? A. Yes, sir.

Q. You do not know what repairs were made?

A. I do not know myself, personally.

Q. Do you know by whom they were made?

A. Mr. Knight had charge of it. I do not know personally.

Q. You do not know who made the repairs, if any were made? [787]

A. I understand the Atlas Gas Engine Company made some of the repairs. I believe that the Samson Iron Works furnished some parts.

Q. Subsequent to the Walnut Grove job we are talking of.

A. Yes. I believe most of these repairs on the dredger itself were made by our own men, Mr. Knight and a machinist we had hired, and the dredgemen. As to the details of these particular repairs, Mr. Knight would be able to tell you clearly about them.

(Deposition of R. A. Perry.)

Q. Are the bills for those repairs in the office?

A. I asked my bookkeeper to find the bills in connection with that particular repairs, and he informed me that the work was so mixed that it was hard to segregate the bills showing the exact amount of work from the bills that were done on the gas engines. At the time the labor was performed it was paid for, and the labor on the dredge indicated by time checks, but said time checks do not segregate as to what the men were doing. We would be glad to furnish any segregated bills we can find.

Q. Never mind what you are going to do—however, go ahead and make your offer.

A. As above stated, the bookkeeper states it is impossible to segregate the expenditures made on the repairs.

Q. When were those repairs made on the gas engines?

A. During December and January.

Q. When did Mr. Cutting first tell you that the Richmond Dredging Company claimed to own the engines that you had put aboard the dredger "Richmond No. 1" in substitution for the engines that were on there when you first chartered her?

A. I guess about three or four months ago.

Q. About three or four months ago?

A. Yes, sir.

Q. Did he not tell you that in September, 1910?

A. Not that I know anything about.

Q. Did I not tell you that the Richmond Dredging Company claimed [787a] to own those engines,

(Deposition of R. A. Perry.)

and did you not negotiate with me as to renting the dredger from the Richmond Dredging Company subsequent to the day she was attached by the marshal and before she was released on the 14th day of December?

A. I do not recall any time that I negotiated with you at all for the rent of the "Richmond."

Q. Did you not spend one evening in my office with Mr. Lillick and Mr. Spilman, and either Mr. Connor or Mr. Cummins? Don't you remember that one evening the five of us were up there and spent practically the whole of one evening endeavoring to arrive at some agreement by which you could operate the dredger "Richmond No. 1" after she had been attached by the marshal?

A. I don't think we were negotiating for operating the dredger. We were already operating her, I think.

Q. Yes, you were operating her under a license which I had consented to for 12 days.

A. I was not a party to any negotiations.

Q. Were you not up in my office in the Mills Building one evening between the 2d and 14th day of September, 1910, concerning this dredger "Richmond No. 1" which was then under attachment by the United States marshal?

A. I remember calling up there at some time or other. I don't remember the dates or month.

Q. Don't you know it was before the \$40,000 bond was put up that was filed herein?

A. No, sir, I don't know when the bond was filed.

(Deposition of R. A. Perry.)

I was not here when the bond was filed, I don't think.

Q. You were here a day or two before that, were you not?

A. I think not. I think I was in Galveston when the bond was filed. [788]

Q. Will you say you were not in my office between the 2d and 14th of September and we can fix those dates as the time between which the dredger was attached by the marshal and released by the Court?

A. I don't remember what time I was in your office.

Q. Did you have anything to do with me prior to the filing of this libel?

A. No, sir, I don't think I ever met you before that.

Q. And you did not see me from that time for several months afterwards, at the time you first met *time*, for several months afterwards?

A. I think I met you once in the saloon on Montgomery Street, at lunch time. I don't remember whether that was before or after.

Q. We were having lunch in Collins & Wheelan's?

A. We were each having lunch.

Q. We did not have it together?

A. No, sir, we happened to be seated near together.

Q. That was several months after?

A. I don't remember when it was.

Q. On the night you were in my office, did you not say you were willing to pay us \$50 a day provided we consented to your taking off the engines when

(Deposition of R. A. Perry.)

you finished the contract that you were then?

A. I don't remember what I said.

Q. You knew at that time that the Richmond Dredging Company was claiming to own the engines that you put aboard the dredger in substitution for the engines that were on there, did you not?

A. Please read that question again. I have got mixed up on the question. (The Reporter reads the question.) I believe our attorneys advised us something to that effect. [789]

Q. Did you not know yourself that the Richmond Dredging Company was claiming to own them?

A. I never read any of the papers.

Q. I am not asking that, Mr. Perry.

A. I did not read any of the papers at all. The attorneys told me that was your contention.

Q. When did they first tell you that?

A. I do not remember the date.

Q. Was it not immediately after the dredger was seized by the United States marshal?

A. No, sir, because I did not return for some little time after that from the East, after the dredger was seized. I believe I got a telegram—I am not sure of that even—in the east that the dredger had been seized or attached by the Richmond Dredging Company.

Q. How long after you got that telegram did you start for San Francisco?

A. About a month, I believe; I am not sure of that, even.

Q. Did I not ask you when I met you in Collins

(Deposition of R. A. Perry.)

& Wheelan's, if you knew me, and you turned around and said, "Yes, I know you all right"?

A. I don't remember what you said to me in Collins & Wheelan's. You said a whole lot of things, inside and outside.

Q. Yes, exactly. Then you want your testimony to go to the effect that you were not in San Francisco between the time the dredge was seized on the 2d day of September, 1910, and the 1st day of October, or thereabouts, 1910?

A. I could not swear to that. I would have to find that out. I have got a memorandum-book that tells me where I am.

Q. You look at your memorandum-book without delay and see if you were not here between September 2d and September 14th, 1910, and in my office.
[790]

A. I will telephone to my office to get the information you want.

(The witness telephones.)

Q. The information is on its way now, is it, Mr. Perry? A. Yes, sir.

Q. Then we will drop that and come back to it presently. How many times since the dredger was attached, has Mr. Cutting told you that the Richmond Dredging Company owned those engines, and that they were going to get them or be paid for the removal of them? A. I could not tell you.

Q. Many times?

A. No, sir; I have not seen him many times.

Q. But you did have some conversation with him

(Deposition of R. A. Perry.)

concerning this thing? A. Probably two.

Q. Not more than that?

A. I think not previous to yesterday.

Q. When did you cause those engines to be removed from the dredger "Richmond No. 1" that you had put aboard there, heretofore described?

A. Immediately after the completion of the work at Walnut Grove.

Q. Immediately after? A. Yes, sir.

Q. That was December 2d that you completed up there? A. Immediately after December 2d, 1910.

Q. You took one engine off before you took the dredger down from Walnut Grove and put it aboard the "Wink"? A. Yes, sir.

Q. That was about December 2d that you removed that engine? A. Yes, sir.

Q. When did you remove the engine that you got from the Atlas Gas Engine Company?

A. Probably between the 2d and 10th of December, 1910. [791]

Q. Under whose instructions were those engines removed?

A. I don't know how to answer you. I don't know just what you mean.

Q. What officer of the Standard American Dredging Company directed the removal of those engines from the dredger "Richmond No. 1"?

A. I don't know; probably it was myself.

Q. Probably yourself? A. I don't know that.

Q. How soon after you completed your contract at Walnut Grove did you take the one engine from

(Deposition of R. A. Perry.)

“Richmond No. 1” and install it on the “Wink”?

A. I took the California Reclamation Company’s engine from the dredge “Richmond” and installed it on the launch “Wink” immediately after the completion of the contract at Walnut Grove or shortly after December 2d, 1910.

Q. Did you make any application to the United States District Court for the Northern District of California, for permission to remove that engine from “Richmond No. 1”?

A. Not that I am aware of.

Q. You made no application for that. You gave no instructions to have any application made to that court?

A. I personally did not, and I am not aware that anybody else did.

Q. Did you ask any permission from the Richmond Dredging Company to remove that engine?

A. I think not.

Q. Did you between the time you finished that contract and the time you removed that engine and installed it on the “Wink” discuss the matter with your proctors for the purpose of ascertaining their advice as to whether or not it was legal or proper for you to remove that engine from “Richmond No. 1”?

A. I rather think we did, as we were guided by their instructions in all our conduct in connection with this case.

Q. Do you know? [792]

A. I am quite positive as to that.

(Deposition of R. A. Perry.)

Q. Did they instruct you that you might do it, or what was the instruction that they gave you, or the advice they gave you with respect to that matter?

A. They told me to go ahead and take it off.

Q. They told you to go ahead and take it off. Who was it told you that, Mr. Lillick or Mr. Spilman?

A. I think Mr. Lillick told me that. I telephoned him.

Q. You telephoned to him and he told you to go ahead and take it off? A. Yes, sir.

Q. Acting on that you proceeded to take it off?

A. Yes, sir.

Q. Had you asked him for that advice before you had finished the job at Walnut Grove or afterwards?

A. I think it was before. I have this memorandum-book here now, if you want to get it.

Q. Where were you between September 2d and September 14th, 1910?

A. On September 2d, I was in Galveston. Arrived there at 11 A. M. On the 3d, 4th, 5th and 6th I was in Galveston. On the 7th, 8th, 9th, I was en route to Los Angeles via the Southern Pacific Railroad Company. On the 10th I was in Los Angeles. On the 11th I was in Los Angeles. On the 12th I was in Los Angeles. I left there on the 8 P. M. train, that is the Coast Line, for San Francisco, and I was in San Francisco on the 13th, and 14th and 15th.

Q. You were here when the dredger was released by the order of the United States District Court for the Ninth District, in Admiralty.

(Deposition of R. A. Perry.)

A. I don't know what that date was.

Q. Do you remember discussing the matter in my office prior to the release of that vessel to the Standard American Dredging [793] Company on the filing of their bond?

A. No, sir, I don't remember the discussion.

Q. Do you remember being in my office?

A. I remember being there sometime or other. I am looking to see if I can find the time I was there.

Q. Do you remember being in my office in September, 1910?

A. I don't remember the date, and I don't see any note made of it so far.

Q. I evidently did not impress you much at that time. Has that refreshed your memory?

A. I do not see any date there.

Q. Is your memory still being refreshed as to when you were in my office?

A. I could not tell you the date if you were to give me a \$1,000,000.

Q. Do you remember that I told you that the Richmond Dredging Company was going to get those engines that you put aboard the "Richmond No. 1"?

A. Do you mean the time that I called at your office?

Q. Yes.

A. I don't remember what the conversation was when we were in your office. That is a long time ago.

Q. You just mentioned Galveston. Are you not interested in some dredging work in Galveston?

(Deposition of R. A. Perry.)

A. Yes, sir.

Q. You did not mention that. What work are you doing there? A. I mentioned all you asked for.

Q. I asked you if any company in which you were an officer or stockholder was doing any dredging work?

A. If you follow over your questions you will find I answered them all.

Q. What dredging work are you interested in in Galveston? A. Filling the causeway.

Q. What is the price of that work?

A. A quarter of a million dollars. That contract will be completed on the 6th day of [794] this month, October.

Q. Are you interested in any dredging work any place else other than what you have mentioned?

A. Yes, sir.

Q. Where at?

A. That is, the North American Dredging Company of Texas is interested.

Q. Where at? A. At Florida.

Q. What is the contract price of that work?

A. The big contract is completed that we had. We have only got some small work there now.

Q. How much is the contract on which you are finishing now? How much is the contract price on which you have been engaged in that Florida work?

A. The one that is completed?

Q. The contract price of the contract which you have completed, and otherwise?

A. How many years?

(Deposition of R. A. Perry.)

Q. How long have you been engaged in that work at Florida?

A. I have been engaged in Florida?

Q. On the job now? A. I have been two weeks.

Q. How long have you been engaged on the contract, or how long has the North American Dredging Company of Texas been engaged on that work that you mentioned, at Florida?

A. The work I am now engaged on at Florida, which is a new contract for the Seaboard Railway Company, I have been engaged on about two weeks, and we will be done about the 6th or 7th of October, I got a wire to-day.

Q. How big a job was that?

A. Only 80,000 yards.

Q. How much a yard? A. 15 cents.

Q. Have you been interested during the year in any work at Florida? A. Yes, sir.

Q. What was the contract price on that work?

A. A couple of hundred thousand dollars. [795]

Q. Are you interested in any other dredging work in any place else in the world?

A. You mean, have I got contracts?

Q. Yes, you, or any of the companies in which you are a stockholder or officer?

A. No, sir, we have not got any contracts to amount to anything only what I have told you about.

Q. I do not mean small jobs.

A. We cannot take any more contracts than we can do.

Q. That is the extent of your work?

(Deposition of R. A. Perry.)

A. I have told you approximately about what we have done and what we expect to do.

Q. I want to get it generally. I do not want to pry into your business particularly. I do not want to look at it except as it is of interest to me in this case. I am not putting it for the purpose only of asking questions.

A. You know more about my business than anybody else now.

Q. I have not gone into it for curiosity sake. Did the Standard American Dredging Company ever offer the return of dredger "Richmond No. 1" to the marshal of this court? A. I do not know.

Q. Did you ever instruct any of the officers or agents of the Standard American Dredging Company to return it to the marshal of this court?

A. I did not.

Q. So far as you know, no offer has been made to return it to him? A. I don't know of any.

Q. You never gave any instruction to make such an offer to the marshal? A. No, sir.

Q. No one else in the Standard American Dredging Company ever gave any such instructions?

A. Not that I am aware of.

Q. Would anyone have a right to do it?

A. Yes, sir.

Q. You knew the exact condition of dredger "Richmond No. 1" when you first received her? You knew the exact repair she [796] was in?

A. I personally did not examine the dredger "Richmond" to know the conditions.

(Deposition of R. A. Perry.)

Q. You had your agents do it, did you not, or some of your employees?

A. I don't know as they did. It was only a little job we had to do when we first took her over to San Rafael; it was not of much moment; only a small job.

Q. I did not have reference to the San Rafael job; I was speaking of the Lake Merritt job. Do you know the exact condition of the dredger "Richmond No. 1" just prior to your taking her to do the Lake Merritt job?

A. Our office was quite conversant with it being operated there at San Rafael for about a month, possibly a little longer.

Q. Did not the Richmond Dredging Company or Mr. Cutting or Mr. Wernse, come to you while you had the dredger "Richmond No. 1" in Eureka and say that they wanted their dredger to do some work at Richmond?

A. Wernse was in the office quite often, once a month, to get his check. I don't remember what he said. He might have said it to someone else.

Q. Did not the Richmond Dredging Company notify your office they wanted the return of this dredge "Richmond No. 1" before you brought it back from Eureka?

A. I don't know. I shall have to look up the letters and see. I don't remember. I don't know what is in the files.

Q. And did you not ask them if they could not use your "Oakland" on that job?

(Deposition of R. A. Perry.)

A. I think Mr. Cummins, the vice-president of the company, did all the talking about the "Oakland" on the Richmond job.

Q. The relations of the two companies were very friendly at [797] that time, were they not, or seemed to be? Is that the fact, Mr. Perry?

A. I think they were as friendly as the average people are in doing business.

Q. Did the Richmond Dredging Company tell you about how many yards of filling they wanted to do at Richmond with the "Oakland"?

A. I rather think that they did, and I think the charter-party states about how many yards they wanted to do.

Q. They told you what jobs they were, and just about the extent and nature of the work to be done, did they not?

A. I expect they told us what they were going to do. As I say Mr. Cummins had more talk about that than I did.

Q. Was it not understood between the Richmond Dredging Company on the one side, and the Standard American Dredging Company on the other, that if you required the return of your "Oakland" before they completed the 400,000 yards mentioned in the contract, that you would return without delay "Richmond No. 1," and that in effect the Richmond Dredging Company was to have its own dredger or your dredger until that work was completed?

A. I think the charter-party stated about when the dredger was to be returned. I do not remember the

(Deposition of R. A. Perry.)

various conversations about that.

Q. We will refer to the charter-party and have it before you so that you will not make any mistake in testifying as to that point. It may be important later on. You will see in paragraph 8, Mr. Perry, about where that is mentioned. That may refresh your mind by just looking it over.

A. In answer to that question I would say that if we required the dredge "Oakland" to be returned, then we would either return the dredge "Richmond" or pay an increased rental per day for such time as we might keep it, the reason being that we [798] might have the boat employed and have a contract part done that we could not well leave. It might take the entire time to finish the job. That was the reason for an increased rental if the dredge "Richmond" was not immediately returned. This was the penalty we were required to pay if we did not return the dredge "Richmond" immediately upon being notified to do so by the Richmond Dredging Company.

Q. Was that not the reason that the Richmond Dredging Company insisted on this condition, that it did not want to be left in the middle of its contract without its dredger "Richmond No. 1" or the "Oakland"?

Mr. LILLICK.—I submit Mr. Perry does not know what was in the Richmond Dredging Company's mind, and the contract speaks for itself and is the best evidence of what the intention of the parties was.

(Deposition of R. A. Perry.)

Mr. TAUGHER.—Q. Was that not discussed at the time, Mr. Perry?

A. I was not present when the charter-party was concluded. I do not know what the discussion was.

Q. You had to do with the negotiations for it though, had you not?

A. Mr. Cummins, the vice-president, and the secretary, handled this matter. I was away from the city.

Q. So you do not know why the 400,000 yards was mentioned in there specifically. That is why that specific amount 400,000 yards was inserted in that contract?

A. I suppose that was the amount that they expected to do for the Santa Fe Railroad, or whatever they were to do it for—

Mr. LILLICK.—I want to instruct you, Mr. Perry, not to assume in your mind what was in the mind of the other party. If you do not know what the exact situation was in regard to this contract you can simply state that you do not know it. [799]

A. (Continuing.) Although I have no definite means of knowing this. I cannot state why they insisted on this quantity being put in.

Q. Did you not talk over that matter with Mr. Wernse or Mr. Cutting?

A. No, sir; I did not have anything to do with that part of the deal at all. Mr. Cummins and Mr. Connor were the fellows who were dickering on that.

Q. Now, Mr. Perry, in order to learn the construction which you, as the maker of the charter-party

(Deposition of R. A. Perry.)

of February 26, 1910, and as an experienced dredger-man would put on the covenants of that charter-party in which the phrase "reasonable wear and tear excepted" is used, I will again ask you the question which you several times refused to answer yesterday.

Mr. LILLICK.—Which I submit is not so.

Mr. TAUGHER.—Q. To wit: would you consider we were complying with our covenant in that charter-party of February 26th, Mr. Perry, if the cutter gear and the pump and the cables on the "Oakland" had become worn by reasonable usage, and we had replaced those parts with new parts for our convenience to finish our contract, and then just before we returned the dredger to you we took off those parts that we had put on and put back the worn and discarded ones?

A. If the dredger was offered up in the condition mentioned I should submit the charter-party, together with all the facts to our attorney, and request him to advise us in regard to what we should do in the matter, and I should be governed by his advice.

Q. What boat towed the dredger "Richmond No. 1" up to Walnut Grove? A. The "Wink."

Q. What boat towed the dredger "Richmond No. 1" from Walnut [800] Grove back to San Francisco Bay?

Q. How much rent was the California Reclamation Company to charge the Standard American Dredging Company for the engine during the time that it had the engine belonging to the "Wink"?

(Deposition of R. A. Perry.)

A. At the rate of \$200 per month. Charges were made in accordance therewith.

Q. When was that price fixed?

A. It was fixed at the time the engine was turned over to them. It was the same price as the Atlas gas engine was, starting in in July. The Standard American Dredging Company paid the California Reclamation Company \$833.33 rent.

Q. You did not get the cost of those repairs that were made on the gas engines subsequent to the time that you took them off of the dredger "Richmond No. 1"?

A. I explained to you that it has been almost impossible to get the segregated cost, but they estimated the cost as near as they could at \$300.

Q. That cost was mostly for time of the men that you had on the dredger?

A. I could not tell you correctly.

Q. Was not that charge principally for putting the engines back in place and connecting up their piping and painting them?

A. No, sir, it would not amount to that much money.

Q. Putting in new piping?

A. No, sir, because that was charged in another manner against the general cost of overhauling the dredge and returning it.

Q. Can you give us the bills for the repairs made on the engines of the "Richmond No. 1" segregated from the expense of repairing the dredger? Can you have that done for us? I would not ask you to

(Deposition of R. A. Perry.)

stay here for that yourself.

A. I will instruct the office to have prepared this information in the best form possible that can be obtained in the [801] office. We have no objection to furnishing all the vouchers and everything else you wish in connection with it.

Q. With the names of the men who did the work. We would like to cross-examine them if we have the opportunity. What was the other information that you were going to give me?

A. You wanted to know the pipe purchased for the Lake Merritt job and the dates. I will give them to you. February 8, 1909, 56 lengths, 12 inches diameter, No. 12 shore pipe, 1635 $\frac{1}{3}$ feet at 77 $\frac{1}{2}$ ¢ per lineal foot equals \$1,267.38. Ditto, February 17th, 26 lengths of 12-inch pipe, the same as the other, only 759 $\frac{3}{4}$ feet lineal at 77 $\frac{1}{2}$ ¢, \$588.81. The third item is 34 lengths, 12 inch diameter, No. 10 pontoon pipe, 791 $\frac{1}{4}$ feet at \$1.00 per foot, \$791.25. February 25th, 1909, 55 lengths, 12 inches in diameter, 12 shore pipe, 1605 $\frac{1}{6}$ feet at 77 $\frac{1}{2}$ ¢, \$1,244, making the total number of feet 4,791 $\frac{7}{12}$ feet lineal. Total cost \$3,891.44.

Q. Is that the whole of the pipe that was purchased or used in the Lake Merritt job?

A. Yes, sir, that is all I know about except what we brought over with the dredge when she was brought over. I don't know just what that was.

Q. Was there not 15-inch pipe used on that job?

A. There was some pipe brought away with the dredge. I think that was 12-inch pipe. I don't

(Deposition of R. A. Perry.)

know how many feet it was. My recollection is there were some 400 or 500 feet of 15-inch pipe, but I am not sure about it.

Q. Was it returned to the Richmond Dredging Company at Richmond when you put the dredger back in the canal? A. I don't know.

Q. How much pipe did you send back to Richmond when you put the dredger in the canal at Richmond in the early part of 1911? [802]

A. Approximately something over 1,000 feet.

Q. Something over 1,000 feet?

A. Yes, sir. You asked me also how much pipe we purchased for the Walnut Grove work.

Q. Yes.

A. If you want all this thing in detail I can give it to you.

Q. Just generally. A. Total 1,602 feet.

Q. When did you purchase that?

A. It was purchased on July 2d, July 6th, 12th, 16th, from W. W. Montague & Co., shown on our voucher 2879. I told you there were 1602 feet, and it cost \$1,637.15. In addition to the pipe there were four elbows. Anyway the whole business cost \$1,637.15.

Mr. TAUGHER.—I think that will conclude my cross-examination.

Redirect Examination.

Mr. LILLICK.—Q. As I understand you, Mr. Perry, as it was given on cross-examination, a great portion of that was taken from data furnished you by the office and information obtained by you from

(Deposition of R. A. Perry.)

either officials of the company or employees of the company; is that a fact?

A. Considerable of it, yes. That is the only way I have of knowing about everything.

Q. Do you care to be understood as vouching for the amount of hours and particular statements of cost, and things of that sort as they were given in your cross-examination, without making any allowance for a possible error that an accountant in your office might make?

Mr. TAUGHER.—I object to the form of the question and will, of course, object to the materiality, or the right of the witness to say anything at the end of his cross-examination to [803] modify or take away the sting of his statements that he might have made in there.

A. I would not like to guarantee that the additions showing the actual hours operated by the dredgers and the yardage excavated are absolutely correct. I have taken these statements to be correct from the office as they have been compiled by the office force.

Mr. LILLICK.—Q. To the best of your knowledge and to the best of your information and belief, they are correct, are they? A. Yes, sir.

Q. There is a possibility that in some particular instance there may be an error by reason of a mistake in addition or something of that kind?

A. Yes, sir. There is always a chance for an error in any accountant's statements.

Mr. TAUGHER.—Q. You are quite willing to stand by the statements made in your cross-exam-

(Deposition of R. A. Perry.)

ination, or do you want to modify those answers by some general modifying clause such as this?

A. Any statements that I have made of my own knowledge I have no reason to make any corrections for. Such information that I have given, which has been taken from the office, should there be any error in it, I wish to state that I have only given the best information that is obtainable.

Mr. LILLICK.—Q. And it is your present belief that every statement you have made here is true?

A. I believe that every statement I have made is absolutely correct and truthful.

Q. In August, 1910, had you any contract which required the use of a hydraulic dredger?

A. Yes, sir. [804]

Q. I hand you a letter on the letter-head of the Monarch Oil Refining Company, dated June 18th, 1910, which purports to be signed "Monarch Oil Refining Company by George A. Douglas, Secretary," and ask you whether or not that is a document that you have had in your office (handing).

A. Yes, sir, that is correct.

Q. And is the original of the letter or contract under which you had certain work to do for the Monarch Oil Refining Company? A. Yes, sir.

Mr. LILLICK.—I offer that letter in evidence and ask that it be marked Claimant's Exhibit No. 17.

(The letter is marked "Claimant's Exhibit No. 17" and is as follows:)

(Deposition of R. A. Perry.)

[Claimant's Exhibit No. 17.]

"MONARCH OIL REFINING CO.

Refiners of Petroleum.

90 Clay Street.

San Francisco, Cal.

June 18, 1910.

Standard American Dredging Co.

712 Merchants Exchange,

City.

Dear Sirs:

ATTENTION TO MR. R. A. PERRY.

We beg to say that we hereby accept your bid of June 7th, for filling in at our property at West Berkeley, as per blue print by Mr. Howard C. Holmes, and dated May 16, 1910, to the top of fill, as noted thereon, for the total sum of seventy-four hundred and twenty-five dollars (\$7,425.00).

The above work to be done to the satisfaction of our Engineer, Mr. Howard C. Holmes, and to begin on or about the [805] 1st of August, 1910.

Yours truly,

MONARCH OIL REFINING CO.

By GEO. A. DOUGLAS."

Q. I hand you a letter dated August 12th, 1910, purporting to be signed by the Monarch Oil Refining Company, by George A. Douglas as secretary, and ask you whether or not you know Mr. Douglas' signature (handing). A. Yes, sir.

Q. Is that Mr. Douglas' signature on exhibit 17 just offered in evidence? A. Yes, sir.

(Deposition of R. A. Perry.)

Q. Did the Standard American Dredging Company receive that letter from the Monarch Oil Refining Company, on or about the date of that letter?

A. Yes, sir.

Mr. LILLICK.—We offer this letter in evidence and ask that it be marked Claimant's Exhibit No. 18.

(The letter is marked "Claimant's Exhibit No. 18" and is as follows:)

[Claimant's Exhibit No. 18.]

"MONARCH OIL REFINING CO.

Refiners of Petroleum.

90 Clay St.

San Francisco, Cal.

Aug. 12, 1910.

Standard American Dredging Co.

Merchants Exchange Bldg. City.

Gentlemen:

Attention to Mr. Perry.

I beg to say that the bulkhead being constructed at our plant at West Berkeley will be completed in 10 days.

Kindly arrange to commence work accordingly about that time and rush to completion as quickly as possible and oblige.

Yours very truly,

MONARCH OIL REFINING COMPANY. [806]

By GEO. A. DOUGLAS, Sec'y."

Q. Had you had any verbal communications with Mr. Douglas previous to the receipt of the letter under date of August 12, 1910, in regard to the contract

(Deposition of R. A. Perry.)

referred to here?

A. He told us some time before that that they were going to have the bulkhead done, and wanted us to get started. They did not want the filling delayed, as they wanted to put up some buildings there. We told them we would get started so as to finish the work without any unnecessary delay.

Q. What dredger did you use on the work provided for in the contract?

A. The Standard American Dredging Company's dredge "Oakland."

Q. After having this verbal communication from Mr. Douglas in regard to it, did you communicate with the Richmond Dredging Company in regard to the "Oakland"?

A. I told Mr. Wernse once, when he was down in the office, that we had taken a job to fill in a bulkhead for the Monarch Oil Company and they would soon have the bulkhead ready, and I asked him at that time if he would soon be through with the fill they were making at Richmond.

Q. Did you, after that conversation with Mr. Wernse, follow up the notice with any written communication?

A. I don't remember. I could not tell you that without reference to the office files.

Q. Do you remember one of the exhibits introduced in the case marked "Claimant's Exhibit 81½," and I will ask you whether by refreshing your recollection you can state what you did in the way of noti-

(Deposition of R. A. Perry.)

fying the Richmond Dredging Company of the situation?

A. I wrote a letter to the Richmond Dredging Company.

Q. That letter is "Claimant's Exhibit 81½"?

A. Yes, sir. [807]

Q. Speaking from your knowledge of the situation of the Standard American Dredging Company on or about August 12th, 1910, and the cross-examination which you have been subjected to as to the effort of the Standard American Dredging Company to prevent the Richmond Dredging Company from bidding on work, did the company withdraw the "Oakland" from the Richmond Dredging Company, or notify them that the Standard American Dredging Company desired the "Oakland," have any intent by so doing to prevent the Richmond Dredging Company from either bidding upon contracts, or using the "Oakland"?

Mr. TAUGHER.—I object to the form of the question upon the ground that it is too complex, involved and leading and suggestive, and calling for facts to be found and determined by the Court.

A. No, sir. The only object we had in calling for the return of the "Oakland" was to comply with our obligation to the Monarch Oil Company, which was pressing, and this was the only dredger available that we had to do this work with.

Mr. LILLICK.—Q. I hand you a letter dated September 3d, 1910, purporting to be signed by George A. Douglas, and ask you whether or not that is Mr.

(Deposition of R. A. Perry.)

Douglas' signature, and if it is, whether you received the letter on or about the date thereof (handing).

A. Yes, sir, that is the signature, and I received the letter.

Mr. LILLICK.—We offer the letter in evidence and ask that it be marked Claimant's Exhibit No. 19.

(The letter is marked "Claimant's Exhibit No. 19" and is as follows:)

[Claimant's Exhibit No. 19.]

"MONARCH OIL REFINING CO.

Refiners of Petroleum.

90 Clay St.

San Francisco, Cal. [808]

Sept. 3, 1910.

Standard American Dredging Co.

712 Merchants Exchange Bldg.

San Francisco, Cal.

Gentlemen:

I beg to say that we have contracted for doubling the capacity of our Plant at West Berkeley, and it is imperative that the work of filling should be taken up immediately.

I wish you would give this matter your prompt attention, and advise us at once when we can expect this work to be done, as you first advised me that the dredger would be in readiness to commence the first of this month.

Yours truly,

MONARCH OIL REFINING CO.

By GEO. A. DOUGLAS, Secretary."

Q. I hand you a carbon copy of a letter dated

(Deposition of R. A. Perry.)

September 6th, 1910, which is unsigned, but marked "W. A. H. C.," and ask you where that carbon copy was obtained from.

A. This carbon copy was obtained from the office files of the Standard American Dredging Company.

Q. What about the original of the letter?

A. The original was mailed to the Monarch Oil Refining Company.

Mr. LILLICK.—I offer that letter in evidence and ask that it be marked Claimant's Exhibit No. 20.

(The letter is marked "Claimant's Exhibit No. 20" and is as follows:)

[Claimant's Exhibit No. 20.]

"Cal., Sep. 6, 1910.

Monarch Oil Refining Co.,

#90 Clay St.,

San Francisco, Cal.

Gentlemen:— [809]

Attention to Mr. Douglas.

In answer to your letter of September 3rd: We beg to inform you that we are bringing our dredge over from Point Richmond and it will be at your West Berkeley plant tomorrow, September 7th. We expect to be started with the filling at the latest by Friday, September 9th, and will push the matter to an early completion.

Respectfully yours,

STANDARD AMERICAN DREDGING
COMPANY,

By _____.

W. A. H. C."

(Deposition of R. A. Perry.)

Q. Referring to the letters dated September 3d and September 6th, 1910, had you any personal communications with Mr. Douglas over the telephone or otherwise, with regard to the subject matter of the letters?

A. Douglas rang up the office several times and asked about when we were going to get started on the fill. We told him we would get at it as quick as possible.

Q. Referring to gas engines, particularly with reference to their use on a dredger of the character of "Richmond No. 1," in your opinion, Mr. Perry, does it make any difference as to the strain on the engine whether the dredge is working in sand or in soft mud?

A. You refer, I presume, to the engine driving the centrifugal pump?

Q. Yes.

A. No, sir. I do not think the strain on the engine would be any greater pumping sand than it would mud.

Q. Does the sand come in contact with the engine in any way? A. No, sir.

Q. Does it come in contact with any part of the engine? A. No, sir. [810]

Q. What, if you know, was the result of the action of the mud and other material that was pumped through the discharge pipe at Lake Merritt upon the pipe? A. What do you mean by the action?

Q. What was the result? How did it affect the pipe?

(Deposition of R. A. Perry.)

A. The action of the mud on the pipe is not severe like the action of sand or gravel on the pipe as to wear.

Q. There was gravel in the Lake Merritt job, was there not?

A. A small amount as compared to the whole quantity of material handled.

Q. Do you personally know whether or not the pipe that was used on the Lake Merritt job, was worn out on the job?

A. A portion of it was worn and destroyed on the job, and the rest of it was partly worn on the job.

Q. Where was the balance of that pipe taken, if you know—the portion that was not worn out?

A. We transported such a pipe when we first started the Eureka job, to Eureka for use at that place. Later, we transported to Eureka for use on that job an additional quantity of pipe. After completing the work at Eureka, the pipe was returned to San Francisco, such portion of it that was not worn out, and that pipe, together with the balance of the pipe that had been held over in San Francisco after completion of the Lake Merritt job, was transported to the Walnut Grove job. The pipe had become somewhat worn by the time it reached the Walnut Grove job—what was left of it—and before the Walnut Grove job was completed it was largely worn out, most of it, so much so that we were obliged to purchase some considerable additional pipe, probably about 1,500 feet, for the purpose of providing sufficient pipe at Walnut Grove. The [811] Walnut

(Deposition of R. A. Perry.)

Grove pipe-line at no time exceeded, I believe, more than 2,500 feet at one time; possibly 3,000 feet at some time.

Q. Do you know whether or not the pipe that had not been worn out was returned to the Richmond Dredging Company, or offered to be returned to it when the dredger was tendered to it?

A. I believe it was.

Q. In your cross-examination you stated that the men who were working on the dredger just before she was tendered back to the Richmond Dredging Company, painted her up so as to make her look like something. Do you want it understood that the work was done for the purpose of glossing over defective repairs?

Mr. TAUGHER.—I object to the question upon the ground that the question is leading and suggestive.

A. No, sir. I wanted my answer to the question to be understood, that the answer or statement made was that the house was dirty and greasy, and we scrubbed it off and put a coat of paint on it. Those were the instructions to our men who cleaned up the boat so as to be presentable to return.

Mr. LILLICK.—Q. Mr. Perry, will you explain what you meant in your cross-examination when, in reply to one of the questions asked you by Mr. Taugher, you used the language, "I told them to paint her up so as to make her look like something," with reference not only to the deckhouse but to the engines?

(Deposition of R. A. Perry.)

A. My explanation of that is that it is customary to keep machinery on our dredgers painted at times, so that they would have a good appearance, as well as otherwise. That is the reason for my issuing orders to paint the dredge up, so that it would look like something, not look like it was uncared for.

Q. Do you know whether or not any instructions were given any of the workmen working on her at that time to cover any defects with paint? [812]

A. No, there was no instructions of that kind given.

Q. Referring to the lease which is marked as "Claimant's Exhibit 5," between the Atlas Gas Engine Company and R. A. Perry, will you state in what capacity you acted in signing that lease, and for whose account, if any, you signed it?

A. I acted as the agent of the Standard American Dredging Company, and signed the lease on their account.

Q. Do you know the construction of the "Richmond No. 1" well enough to know whether or not engines of more than the capacity of the engines which were first on board her would by their action strain the timbers of the dredge? A. Yes, sir.

Q. Would the engines which you placed upon the dredger after removing those originally upon her have in any way strained her hull or timbers or been of any more detriment in the way of wear and tear upon the dredger than the engines which were originally on board of her?

Mr. TAUGHER.—I object to that question on the

(Deposition of R. A. Perry.)

ground that it is complex, involved, leading, suggestive, and calling for the conclusion and opinion of the witness, and a fact to be found by the Court.

A. No, sir.

Mr. LILLICK.—Q. Is it any more trying upon a dredger in the way of wear and tear to elevate material sucked up through her suction pipe and cutter and then up on the shore at 10 or 12 feet than it is to raise the same material 2 feet?

A. No, not any harder on the dredger.

Mr. TAUGHER.—I object to that question on the ground that it is involved, leading, suggestive, and calling for the opinion and conclusion of the witness, and a fact to be found by the Court. [813]

Mr. LILLICK.—Q. Referring to the charter-party, Mr. Perry, what was the result to the engines which were originally upon the dredger by replacing them by other power?

A. The fact that the engines were laid up more than half the time during the charter-party was a saving on the engines and a betterment of the engines, for the reason they were not operated the full time that they would have been had we not supplied other engines with greater power to take their place.

Q. Would that same result follow from your use of an electric motor at Eureka? A. Yes.

Q. And by your use of a booster and other aids?

A. Yes, sir.

Mr. LILLICK.—That is all, Mr. Perry.

Recross-examination.

Mr. TAUGHER.—Q. The rust that was allowed

(Deposition of R. A. Perry.)

to collect on those engines while you were not using them was a betterment for the engines?

A. The engines were thoroughly oiled and the cylinders filled with oil when we laid them up.

Q. I want to know that—all the time that they were idle? A. They were supposed to be.

Q. Well, then, I understand that one of the reasons that you object to an examination being made of this dredger or those engines starting is because the rust that is on there now might prevent the engines from turning over?

A. The valve gear is composed of small pins and mechanism, and it would be necessary, in my opinion, to have those all removed and cleaned up and overhauled before attempting to operate those engines. It is always done in laying up a steam engine.

Q. Have you been keeping those engines oiled, those cylinders oiled, and the various parts of the engines, since the 3d day of February, [814] 1911?

A. The instructions that the watchman had was to take care of everything on board the dredger and look after it properly. I cannot tell you what he did.

Q. Was that to safely hold, or to keep in repair? That is the instructions, to safely hold it?

A. The instructions to my watchman was to safely care for the dredger and all parts belonging thereto while he was watchman on the dredger.

Q. Was he just to safely hold it or safely protect it, or was he to keep it in repair?

(Deposition of R. A. Perry.)

A. He was to keep it greased up and attended to. Any place we lay up a set of engines we smear them with grease.

Q. I am talking about these engines; these engines did not belong to you.

A. It don't make any difference; to take care of them.

Q. Did you keep oil on those engines over there after the 3d day of February, 1911, on those cylinders?

A. As I have stated, the instructions to the watchman were to care for the dredger and all parts belonging thereto.

Q. What was the watchman's name?

A. Mr. Gustavson.

Q. He is not aboard the dredger now, is he?

A. I think not.

Q. Is he still in your employ?

A. I believe he is, but do not know. There is so many men working for us that I could not keep track of them.

Q. Did you instruct him to make repairs on the dredger as might be needed?

A. He was given instructions to take care of the dredger while it was laid up.

Q. Were a part of his instructions to keep it in repair? [815]

A. There was no repair to be made when laid up; the repairs were all made before he was put in charge as watchman.

Q. Did you instruct him to keep it oiled so that

(Deposition of R. A. Perry.)

rust would not accumulate on the various parts of the engine and on the other machinery of the dredger?

A. He was instructed to keep things greased up and take care of everything.

Q. Keep the rust from accumulating on there?

A. That is part of the watchman's business.

Q. But because of the rust that might have accumulated over there you are not willing we should make an examination of the dredger?

A. I have not said anything about what I was willing to do at all.

Q. Your attorneys, proctors, under your instructions, are not willing to.

Mr. LILLICK.—Mr. Perry has already stated that we wrote that, as I remember it—I do not know whether he said it or not, but that is a fact.

Mr. TAUGHER.—Q. Isn't that the reason you allege for your unwillingness to permit us to make an examination of the dredger, to wit, that the rust that might have accumulated on there might prevent the engines now from operating at all?

A. My reasons have been clearly stated before, that I am willing to be governed by the instructions that my attorneys have handed me in reference to this particular matter.

Q. Now, Mr. Perry, was it to perform this contract with the Monarch Oil Refining Company that you notified the Richmond Dredging Company that you wanted the return of your dredger "Oakland"?

A. Yes, for this particular work.

(Deposition of R. A. Perry.)

Q. It was to complete this particular job that you notified them that you wanted your dredger back?

A. Yes. [816]

Q. Now, why did you wait until the 12th of August to notify them that you wanted this dredger back when you got this letter on the 18th of June?

A. According to the contract, which was dated June 18th, 1910, it was stipulated that the work was to begin on or before the 1st of August, 1910. The contract, as before stated, was to begin on or about that time. The time of the completing of the bulkhead was not definite. We did not want to press the time of commencing the work unnecessarily. The Monarch Oil Refining Company telephoned us a time or two wanting to know when we were going to get started, and I kept standing them off, I wanted to be sure the bulkhead was well done before starting; then they followed that up by other letters demanding, after waiting a short length of time, that we start work forthwith.

Q. The fact that the bids for the dredging work at Stockton were opened on the 12th day of August, 1910, had nothing whatever to do with or no connection by way of cause or effect with your letter terminating the lease of the dredger "Oakland"?

A. No, sir; the only reason that we asked for—

Q. You can answer that yes or no.

Mr. LILLICK.—He has answered no. Let him finish his answer.

A. The only reason that we asked for the dredger

(Deposition of R. A. Perry.)

back was to fulfill our obligations that we had on hand.

Mr. TAUGHER.—Q. Namely, this contract with the Monarch Oil Refining Company for \$7,425?

A. Yes.

Q. That is your reason? A. Yes.

Q. Now, could you have procured any other dredger to do this job? A. Not that I know of.

[817]

Q. You could not have procured another dredger to do this little job of \$7,425? A. No.

Q. What? A. No.

Q. Did you do this job with the "Oakland"?

A. Yes.

Q. Did you complete it? A. Yes.

Q. Now, at the time you served notice on the Richmond Dredging Company terminating their lease of the "Oakland" you knew that they had not finished their 400,000 cubic yards of filling at Richmond, did you not?

A. I did not know what they had done at that time.

Q. Well, you knew they were still working at it, didn't you? Where is that letter of August 16th terminating that contract? Haven't we got that? You wrote that letter, didn't you, terminating the lease (handing)? A. Yes.

Q. You knew at the time that they were still doing dredging work over there with the "Oakland," didn't you, when you wrote that letter?

A. I might have known—I don't know whether

(Deposition of R. A. Perry.)

I knew they were through or about through, or whether they were willing to stop, or what the condition was.

Q. Well, you did not know it of your own knowledge?

A. I had no way of knowing it of my own knowledge.

Q. Didn't you know they still used the dredger "Oakland" over on that job—did you instruct Mr. Connor—what was Mr. Connor's position in the company? A. Secretary. [818]

Q. Did you instruct Mr. Connor, Secretary of the Standard American Dredging Company to notify the Richmond Dredging Company that you terminated the lease of the "Oakland" and required its return to you?

A. Why, that letter states, Mr. Taugher, that I am the fellow that wrote the letter.

Q. You wrote the letter and Mr. Connor gave it to them? A. I don't know who delivered it.

Q. You don't know who delivered it?

A. No, sir.

Q. Did Mr. Connor tell you that he had a conversation with Mr. Cutting and that Mr. Cutting informed him that they would complete the work they had to do with the "Oakland" in about three or four weeks? A. I don't remember.

Q. You don't remember? Do you remember any conversation? Do you remember his reporting any such conversation as that? A. No, sir.

Q. Did you make any inquiry before terminating

(Deposition of R. A. Perry.)

that lease as to whether or not the Richmond Dredging Company had completed 400,000 yards of filling?

A. I don't remember about making any inquiry.

Q. Did you know at the time that you sent them that letter that you were not going to turn over their dredger "Richmond No. 1" to them?

A. I did not know anything about it at that time.

Q. Well, did you know on the 12th of August, 1910, how long it was going to take to complete the Walnut Grove job? A. No.

Q. Did you know about how long it would take you?

A. We expected to get done at least a month and a half quicker than we did. We did not have very good luck when we started. [819]

Q. When did you start the Walnut Grove job—well, Mr. Perry, did you know on the 12th of August, 1910, about how long it was going to take you to complete the Walnut Grove job with the "Richmond No. 1"?

A. Our estimate was we could do the job all told in 90 days.

Q. I am asking you on the 12th of August, when you served that notice terminating the lease of the "Oakland"?

A. Yes, we thought we could do the job in 90 days at that time.

Q. In 90 days from the 12th of August?

A. Yes.

Q. Then you did not intend to turn over the "Richmond" for at least 90 days after you served

(Deposition of R. A. Perry.)

a notice terminating the lease of the "Oakland"?

A. I don't know what we intended at that time about the "Richmond."

Q. And you made no inquiry at that time as to whether or not the Richmond Dredging Company had completed its contract or its dredging work over there? A. Not that I remember about.

Q. You made no inquiry even, and you had no knowledge of it then, as to how long it would take to complete it?

A. No, I had no direct knowledge.

Q. You made no inquiry at all?

A. Not that I remember of.

Q. Didn't even ask Mr. Cutting over the telephone or Mr. Wernse over the telephone?

A. I talked to Mr. Wernse, as I heretofore told you, a couple of weeks before this time.

Q. Did he tell you how long it would take to complete the work over there then?

A. I told him that the Monarch Oil Company were after us to get started, and I asked how long they would be before getting through, and he said he could not tell exactly. [820]

Q. Well, he told you, then, he did not know how long it would take?

A. He said he could not tell exactly.

Q. When you terminated that lease of the "Oakland," you did not know how long it would take them and you did not make any inquiry?

A. Not that I remember of.

Q. And you knew you were not going to turn

(Deposition of R. A. Perry.)

over the dredger "Richmond No. 1" to them until after 90 days from that time?

A. No, I did not know anything at that time about the "Richmond No. 1."

Q. Well, did you intend to turn her over before you completed the contract at Walnut Grove?

A. I had not decided what I was going to do at that time.

Q. You had not decided what you were going to do? A. No.

Q. When did you decide what you were going to do? When did you decide how long you would keep the "Richmond No. 1"?

A. I do not remember the date.

Q. You do not remember the date? A. No.

Q. Did you know that they had a bond up to complete the contract with the Santa Fe? That is, did you know that the Richmond Dredging Company had a bond up to complete their filling work with the Santa Fe within a certain time? A. No.

Q. Didn't know that? A. No.

Q. Mr. Cutting or Mr. Wernse never told you that? A. Not that I know of.

Q. Did you know that they had a bond up to complete their contract with the city of Richmond within a certain time? [821]

A. I did not know anything about that.

Mr. LILLICK.—Mr. Reporter, enter a protest from the proctor for the respondent as to the course of the recross-examination as to its materiality, relevancy and competency, and a notice to the proc-

(Deposition of R. A. Perry.)

tor for the libelant, at the proper time we shall make an application to the Court for an order directing the costs of the deposition to be taxed to the libelant.

Mr. TAUGHER.—Q. Did you ever say to Mr. Franks or to anyone else that you had Cutting over a barrel and that he could not do that Stockton job?

A. No, sir; I never told anybody I had Cutting over a barrel. That is not my way of doing business.

Q. Or words to that effect?

A. I never made any statement of the kind.

Q. Or words to that effect?

A. No. I do not make such statements about any one. Nobody had ever heard me make a statement about anybody in that line of talk; that ain't my make up.

Q. Now, one other question, Mr. Perry; is it not the custom among dredger-men when they attempt to make a dredger pump beyond her capacity to aid the dredger by putting on a booster on the pipe-line?

A. I might answer that, Mr. Taugher, by stating that a booster was never known on a pipe-line until I put it on in Galveston three years ago, and we have pumped up to 6,000 feet with our pump, with a single dredge pump and good material; it had to be good material to pump that far. When you talk about a booster, a booster has been only known since our company developed it in the last three years.

Q. Have you developed it? Have you developed

(Deposition of R. A. Perry.)

the use of it?

A. Absolutely; and we are the only people that have pumped long distance pipe-line in the business. [822]

Q. Then you use as many as three boosters on one pipe-line?

A. We pump 19,500 feet and raise the material 20 feet high.

Q. Using three boosters? A. Yes.

Q. Then, why didn't you use a booster on this one— A. We did use a booster.

Q. On the Walnut Grove job?

A. It was cheaper to do it the way we did it.

Mr. TAUGHER.—That is all.

Mr. LILLICK.—That is all.

[Commissioner's Certificate to Deposition of Raymond A. Perry.]

United States of America,
State and Northern District of California,
City and County of San Francisco,—ss.

I, Francis Krull, a United States Commissioner for the Northern District of California, do hereby certify that, in pursuance of the notice and stipulation hereunto annexed, on Monday, October 2d, 1911, beginning at the hour of 8:30 A. M., and Tuesday, October 3d, 1911, to which an adjournment was regularly taken, at the office of Ira S. Lillick, Esq., Room 607 Kohl Building, in the City and County of San Francisco, State of California, personally appeared Raymond A. Perry, a witness produced on behalf of

the claimants in the cause entitled in the caption hereof. J. L. Taugher, Esq., appeared as proctor for the libelant, and Ira S. Lillick, Esq., and J. S. Spilman, Esq., appeared as proctors for the claimants, and the said witness, having been by me first duly cautioned and sworn to testify the [823] truth, the whole truth, and nothing but the truth in said cause, and being carefully examined, deposed and said as appears by his deposition hereto annexed. That said deposition was, pursuant to the stipulation of the proctors for the respective parties hereto, taken in shorthand by Clement Bennett and Edward W. Lehner, and afterwards reduced to typewriting; that the reading over and signing of said deposition of the witness was by the aforesaid stipulation expressly waived.

Accompanying said deposition and annexed thereto and forming a part thereof are Claimants' Exhibits, 1, 2, 3, 4, 5, 6, 7, 8, 9, 10, 11, 12, 13, 14, 16, 17, 18, 19, and 20, introduced in connection therewith and referred to and specified therein. Claimants' Exhibits 8½ and 15, being the property of J. L. Taugher, Esq., have been copied into the record and the originals returned to said J. L. Taugher, Esq.

I further certify that I have retained the said deposition in my possession for the purpose of delivering the same with my own hand to the United States District Court for the Northern District of California, the court for which the same was taken.

And I further certify that I am not of counsel nor attorney for any of the parties in the said deposition and caption named, nor in any way interested

in the event of the cause named in the said caption.

IN WITNESS WHEREOF, I have hereunto subscribed my hand at my office in the City and County of San Francisco, State of California, this 15th day of November, 1911.

[Seal]

FRANCIS KRULL,

U. S. Commissioner, Northern District of California,
at San Francisco.

[Endorsed]: Filed Nov. 15, 1911. Jas. P. Brown,
Clerk. By Francis Krull, Deputy Clerk. [824]

[Opinion.]

[Style of Court, Number and Title of Cause.]

J. L. TAUGHER, Attorney for Libellant.

J. S. SPILMAN and IRA S. LILLICK, Attorneys for Respondent.

DE HAVEN, District Judge.—This is a libel to recover possession of the dredger “Richmond No. 1,” her engines and equipment.

The action was commenced on September 2d, 1910, and the defendant Standard American Dredging Company was then in possession of the dredger; claiming the right to such possession under two agreements, one dated October 18th, 1909, and the other executed on or about February 26th, 1910. By this latter agreement the libellant leased the “Richmond No. 1” to the Standard American Dredging Company and the Standard American Dredging Company leased the dredger “Oakland” to the libellant, the agreement reciting that the “Richmond No. 1” was leased for the term of 60 days from February 26th, 1910, “and for such further time as shall be

fixed and determined as hereinafter provided." Construing the agreement in connection with the prior lease of October 18th, 1909, the Standard American Dredging Company obligated itself to return the "Richmond No. 1," to the libelant, at the expiration of the term for which it was leased, in as good condition and repair as when received, that is "in condition to immediately go to work, reasonable wear and tear and loss or injury by fire excepted, and to pay all expenses of any and all repairs to hull, or machinery, except such as may be made necessary by fire."

It was also provided that the rental to be paid for the "Richmond No. 1" was to be applied as an offset to the rental of the dredger "Oakland" as far as it would go. [825]

The agreement also contained the following clauses:

9. If at any time during the term of this agreement, or any extension thereof, the party of the first part (the defendant Standard American Dredging Company) shall secure work which it desires to do by the use of said dredger "Oakland," it may, at its option either require the party of the second part, (the libelant) after fifteen (15) days' notice in writing, to operate said Dredger "Oakland" twenty-four (24) hours each day until 400,000 cubic yards of filling (including all filling previously done by the "Oakland") shall have been completed or to terminate this lease of the said dredger "Oakland" by giving the party of the second part fifteen (15) days' notice of such termination, and returning the

dredger "Richmond No. 1," to the party of the second part as in said charter provided, or paying the party of the second part at the rate of fifty (\$50) dollars a day for said "Richmond No. 1," for all time it shall be retained by the party of the first part after the expiration of said fifteen (15) days' notice, and the return of the "Oakland" to the party of the first part.

10. It is hereby mutually agreed and understood that the rent of said dredger "Richmond No. 1" shall be eight hundred (\$800) dollars per month, and that the said first party shall have the right to lease and use said dredger "Richmond No. 1" at any and all periods when not in use or required by the party of the second part until January 1st, 1911.

When the "Richmond No. 1" was delivered to the Standard American Dredging Company, under the agreement above referred to, she was equipped with two Samson gas engines which were subsequently, and before the commencement of this action, removed by the Standard American Dredging Company without injury to the dredger and two Atlas gas engines were installed by it in their place, and these remained on the dredger until after the commencement of this action. [826]

On August 12th, 1910, the defendant served notice upon the libelant as follows:

"In accordance with the lease and agreement between you and this company, dated February 26th, 1910, we hereby notify you that we have secured work which we desire to do by the use of the dredger 'Oakland,' and therefore terminate said lease and

require you to return said dredger 'Oakland' to us at Richmond within fifteen days after the service on you of this notice."

On August 16th, 1910, in compliance with the above notice libelant returned the "Oakland" to the defendant dredger company, and at the same time demanded from the defendant company the immediate return of the "Richmond No. 1," and on September 1, 1910, demand was again made by the libelant upon the Standard Dredging Company for the return of the "Richmond No. 1." The notice stated:

"As you have already been notified the Richmond Dredging Company has use for and now requires the dredger 'Richmond No. 1' and said Richmond Dredging Company has heretofore terminated, and now hereby terminates the lease or agreement under which you took and now hold possession of said dredger 'Richmond No. 1,' and again demands the immediate return of said dredger."

The defendant dredging company refused to surrender the possession of the "Richmond No. 1" to libelant and this action was commenced on September 2d, 1910, and on that date the dredger, equipped with the Atlas gas engines, was attached by the libelant under process issued in the action. Subsequently, and while thus equipped, the dredger was released from this attachment and possession thereof restored to the defendant company by order of the Court upon the filing of an admiralty stipulation, by said company, containing the following conditions:

“The conditions of this obligation is such that if the above bounden Standard American Dredging Company, claimant, of said dredger, shall answer, abide by and perform the decree of [827] this Court and return the said dredger in the same condition in which it now is and in good repair and shall pay all damages which may be sustained by reason of the detention of said dredger, then this obligation shall be void, otherwise the same shall be and remain in full force and virtue.”

Thereafter on February 3d, 1911, the Standard American Dredging Company tendered the “Richmond No. 1” to the libelant, but prior to said tender the Atlas gas engines were removed and the Sampson gas engines, which were on the dredger when the defendant company received possession under the leases before mentioned, reinstalled. The libelant refused to accept the dredge.

I have given careful consideration to the voluminous evidence in this case and the briefs of the respective proctors, and will briefly state the conclusions which I have reached.

1. The action was not prematurely brought. The agreement of February 25th, 1910, is certainly not a model of clearness, but I do not think it should be construed as giving to the Standard American Dredging Company the right to retain the possession of the “Richmond No. 1,” against the will of the libelant after the lease of the “Oakland” had been terminated and that dredger returned to the defendant dredging company.

2. The evidence, in my opinion, very clearly

shows that in the removal and reinstallation of the Samson gas engines and in the installation and removal of the Atlas gas engines the hull of the "Richmond No. 1" was not injured and that dredger with the reinstalled Samson gas engines was, when tendered to the libelant, on February 3d, 1911, in as good condition, reasonable wear and tear excepted, as when possession thereof was received by the defendant dredging company under the agreement of February 26th, 1910.

3. I am unable to agree with the contention of the proctor for the libelant that libelant acquired title to the [828] Atlas gas engines when they were installed on the "Richmond No. 1" upon any of the grounds urged by him. The principle by which one acquires title to personal property by accession, by substitution or by extensive repairs is not applicable to the case as presented by the evidence herein, nor is the case governed by the law in relation to fixtures. The Atlas gas engines were only installed by the defendant dredging company for temporary use upon the "Richmond No. 1," and the title thereof did not pass to the libelant. All that the libelant is entitled to demand by the agreement of February 26th, 1910, is, in addition to the price agreed to be for its use, that the dredger with its machinery and equipments should be returned to it in as good condition, reasonable wear and tear excepted, as when possession was delivered to the defendant dredging company, under that agreement.

4. Upon the question of the amount which the libelant is entitled to recover, my conclusion is that

it is entitled to recover the sum of \$50 for each day from August 15th, 1910, to and including February 3d, 1911, and costs. The law requires that "a party injured by a breach of contract must make reasonable exertions to render the injury as light as possible; and he cannot recover for any loss which he might have avoided with ordinary care and reasonable expense." 13 Cyc. 72.

The "Richmond No. 1," her engines, machinery and equipments, being then in as good condition as required by the agreement of February 26th, 1910, it was the duty of the libelant to accept the same when tendered.

It is urged, however, that the libelant was not required to accept the dredger when then tendered, because it was not then equipped with the Atlas gas engines. This contention is based upon the fact that when the Admiralty Stipulation was given the Atlas gas engines were upon the dredger, and that by the terms of such stipulation the defendant dredging company was obligated [829] to "abide by and perform the decree of this Court and return the said dredger in the same condition in which it now is and in good repair, and shall pay all damages which may be sustained by it by reason of the detention of said dredger."

I do not think the stipulation has the effect claimed for it by the libelant. This stipulation was only intended to secure to the libelant the benefit of the final decree of this Court, and cannot be construed as requiring the defendant dredging company to return the "Richmond No. 1" equipped with

the Atlas gas engines if the Court, in its final decree, should determine that these engines were not the property of the libelant.

The Standard American Dredging Company asks that the sum paid by it for the services of a watchman on the "Richmond No. 1" since February 3d, 1911, should be deducted from the amount due the libelant for the rent of the dredger prior to that date. I do not think, however, that the defendant is entitled to that deduction.

Let a decree be entered in favor of the libelant for the recovery of the "Richmond No. 1," and for the sum of \$8,600 for rent of said dredger from August 16th, 1910, to February 3d, 1911, inclusive, at the rate of \$50 per day.

THE LIBELANT TO RECOVER COSTS.

[Endorsed]: Filed Jany. 15th, 1912. Jas. P. Brown, Clerk. By M. T. Scott, Deputy Clerk.
[830]

[Decree.]

UNITED STATES OF AMERICA.

*District Court of the United States of America, for
the Northern District of California.*

At a stated term of the District Court of the United States of America, for the Northern District of California, held in the city of San Francisco, on Wednesday, the 14th day of February, in the year of our Lord one thousand nine hundred and twelve. Present: The Honorable JOHN J. DE HAVEN, District Judge.

IN ADMIRALTY.

[Title of Cause.]

This cause having been heard on the pleadings and the testimony taken under the order of reference to take testimony heretofore made herein, and the cause having been argued and submitted by the proctors for the respective parties, and due deliberation having been had:

IT IS NOW ORDERED, ADJUDGED AND DECREED by the Court that the libelant was at the time of the commencement of this action entitled to the possession of the aforesaid dredger "Richmond No. 1," her boilers and machinery, and the Samson engines belonging to the said dredger.

AND IT IS FURTHER ORDERED, ADJUDGED AND DECREED that the respondent, Standard American Dredging Company, a corporation, pay to the libelant, Richmond Dredging Company, a corporation, the sum of Eight Thousand Six Hundred Dollars (\$8,600.00) for rent of said dredger from August 16th, 1910, to February 3d, 1911, inclusive, at the rate of Fifty Dollars (\$50.00) per day, together with libelant's costs to be taxed; that libelant is not entitled to recover any rental for said dredger subsequent to February 3d, [831] 1911; that respondent, Standard American Dredging Company, is not entitled to recover or to have deducted from the amount due libelant as aforesaid any sum paid by respondent, Standard American Dredging Company, for the services of a watchman on or

1010 *Richmond Dredging Company vs.*

about the "Richmond No. 1."

February 14, 1912.

JOHN J. DE HAVEN,
District Judge.

[Endorsed]: Filed Feb. 14, 1912. Jas. P. Brown,
Clerk. By Francis Krull, Deputy Clerk. [832]

Cost-Bills.

*District Court of the United States, Northern Dis-
trict of California.*

No. 15,072.

RICHMOND DREDGING CO.

vs.

Dredger "RICHMOND NO. 1," etc.

UNITED STATES COMMISSIONER'S COSTS.

1910.	Libelant.	Deft.
Nov. 3.	To Commissioner's Costs (Bonds)	75 3 00
Taxed at (Libelant): \$.75.		

Dated:

JAS. P. BROWN,
Clerk.

[Endorsed]: Filed Jan. 15, 1912. Jas. P. Brown,
Clerk. By M. T. Scott, Deputy Clerk.

San Francisco, Cal., Feb. 21, 1912.

Court No. 15,072.

United States of America,
Northern District of California,—ss.

UNITED STATES MARSHAL'S FEES AND
COSTS.

To the United States, Dr.

For Services of the United States Marshal in the

Standard American Dredging Company et al. 1011
 case of Richmond Dredging Co. vs. Dredger "Rich-
 mond No. 1."

Marshal's Civil Docket No. 5652.

Date of Writ 1910	Nature of Fees and Expenses Charged.	Marshal's Fees and Expenses.
Sept. 3.	Seizing dredger under Monition at Walnut Grove, California..	2 00
	Expenses seizing same.....	7 75
6.	Serving Citation upon Standard American Dredging Co.....	2 00
	Street-cars to serve same.....	30
13.	Proclamation fee	30
	Serving Amended Monition upon R. A. Perry, President of the Standard American Dredging Co.	[833] 2 00
	St. cars	10
	Keeper's fees	32 50
	Poundage on amount of decree	\$8600.00 45 50
	1 per cent on the first \$500.00	5.00
	1/2 of 1 per cent on first \$8100.00	40.50
	Total.....	\$92 45

Taxed at 92.45.

JAS. P. BROWN,
 Clerk.

[Endorsed]: Filed Feb. 21, 1912. Jas. P. Brown,
 Clerk. By M. T. Scott, Deputy Clerk.

*District Court of the United States, Northern Dis-
trict of California.*

No. 15,072.

RICHMOND DREDGING COMPANY, etc.,
vs.

Dredger "RICHMOND NO. 1," etc., STANDARD
AMERICAN DREDGING COMPANY,
Claimant, et al.

CLERK'S COSTS.

1910.		Plain- tiff.	Defend- ant.
Sept. 2.	Filed Libel .20, Oath and Jurat, .50	70	
	Issued Notice of Publica- tion, .90	90	
	Issued Monition, 2, and copy 2	4 00	
	Issued Citation, 2, and copy, 2	4 00	
	Filed Stipulation for Costs, .20	20	
	Filed Monition, .20, Fld. Ret., .20		
	Entd. ret., 30	70	
	Filed Monition, .20, Fld. Ret., .20		
	Entd. ret., 30	70	

1910.

Plain-
tiff. Defend-
ant.

Sept.	7.	Filed Claim, .20, Oath and Jurat, .50.....	
		Filed Stip. for C., .20....	90
	12.	Filed Notice of Motion for order to release, etc.....	20
		Order hearing on motion for order continued, etc.	30
	13.	Order dredger be released upon giving bond, etc.....	30
		Issued orig. amended pro- cess, 2, and orig. copy, 2..	4 00
	14.	Filed bond for release, etc..	20
		Issued notice of bonding, .70	70
		Entering order bond for re- lease approved, etc.....	30
	23.	Filed exceptions to libel...	20
	27.	“ Am. monition, .20, filed ret., .20, entd. ret., .30	70
Oct.	7.	Filed Claim of Calif. Recla- mation Co., .20, Oath & J., .50.....	70
		Filed stipulation for costs, Cal. Rec. Co.....	20
		Filed exceptions to libel, Cal. Rec. Co.....	20
		Filed Claim of Atlas Gas Eng. Co., .20, Oath and J., .50	70
		Filed stip. for costs, .20, Atlas Gas Eng. Co.....	20

1014 *Richmond Dredging Company vs.*

1910.		Plain- tiff.	Defend- ant.
	Order proclamation made		
	.30	30	
	Order claimants have ten		
	days in which to plead...		30
Oct.	17. Order hearing on excep- tions cont'd., etc.....	15	15
	24. Order hearing on excep- tions cont'd., etc.....	15	15
[835]			
Oct.	29. Order hearing on exceptions cont'd., etc.....		30
Nov.	14. Order hearing on excep- tions cont'd., etc.....	30	
	19. HEARING ON EXCEP- TIONS: Argued and sub- mitted.....	15	15
	21. Order Exceptions 1, 2, 3, 6 sustained and Exceptions No. 4. and 5 overruled; Lib. ten days to amend...	30	
Dec.	1. Filed Amended Libel, .20 (10) Filed Exceptions, .20	20	20
1911.			
Jan.	27. Filed notice of setting ex- ceptions for hearing....	20	
Feb.	2. Order exceptions submitted (Resp. not present).....	30	
	Order submission of excep- tions set aside, etc.....		30

1911.

		Plain- tiff.	Defend- ant.
Feb.	6. Order hearing on excep- tions continued, etc....	30	
	14. HEARING ON EXCEP- TIONS: Argued and sub- mitted.....	15	15
	15. Order exceptions II (a) and (b) to Amended Libel herein sustained and ex- ceptions I and II (c) overruled. Order libel- ant allowed to amend....	30	
	23. Order libelant have further time to amend.....	30	
Mar.	9. Filed second amended and supplemental libel, .20..	20	
	18. Filed order extending time, etc.		20
[836]			
Mar.	28. Filed exceptions, 20, filed notice of motion, etc., .20. Entering orders of Apr. 8, 25, May 8, 15, 22, 29, 31, continuing hearing on ex- ceptions, etc.....	1 05	1 05
Jun.	5. HEARING ON EXCEP- TIONS: Argued and sub..	15	15
	14. Order exceptions overruled .30, filed mem. opn., 20....		50
Aug.	1. Filing three answers to second am. libel.....		60

1911.		Plain- tiff.	Defend- ant.
Sept.	8. Filing notice of motion to set case, .20.....	20	
	15. Order cause set for Sept. 25, 1911.....	30	
	25. Order cause set for Sept. 28, 1911.....	30	
	28 By consent: Order cause referred to Com'r., etc.,....	15	15
Nov.	8. Making copy of minute order for resp.....		40
	15. Order cause continued for hearing, etc.....	30	
	20. Filed notice of motion for leave to file, etc.....		20
	24. Filed sup. answer .20.....		20
	HEARING ON ISSUES:		
	Swearing 2 witnesses for S. A. D. Co., .40.....		40
	24. Filing deposition of R. A. Perry, .20, cause sub., 30.		50
Dec.	1. Filing transcript of proceedings of 11-24.....	10	10
	4. Filing memo. on authorities as jurisdiction....	20	
[837]			
Dec.	4. Filing brief of claimant, etc. (S. A. D. Co.).....		20
	Filing brief of claimant, etc. (Cal. Rec. Co.).....		20
	Filing libellant's brief, .20..	20	

1911.		Plain- tiff.	Defend- ant.
	Filing libellant's reply brief, .20.....	20	
	Cause argued and submitted on briefs.....	15	15
1912.	Filing two volumes of testi- mony taken on ref.....		40
Jan. 15.	Filing opinion by De Haven, J., .20.....		20
	Order decree favor of libel- lant, etc.....		30
	Issued copy of opinion for libellant, 21 ffs.....	4 20	
	Issued 2 copies of opinion for respondents... ..		8 40
	Making judgment-roll, 6 ffs. 1.80, Seal, etc. .70.....		2 50
	Dockets and indices, 6.00, fil- ing clerk's bill, .20.....		6 20
	Filing commissioner's bill, .20.....		20
	Filing marshal's bill, .20...		20
Feb. 14.	Filing judgment and decree, .20, entering same, 1.20..		1 40
17.	Filing libellant's memo. of costs.....	20	
		<hr/> 27 50	<hr/> 31 40

Total: \$27.50.

Libellant's Costs: Taxed at ~~\$27.50~~ \$23.20.

JAS. P. BROWN,

Clerk.

Dated: [838]

[Endorsed]: Filed Jan. 15, 1912. Jas. P. Brown,
Clerk. By M. T. Scott, Deputy Clerk.

*In the District Court of the United States for the
Northern District of California.*

IN ADMIRALTY.

RICHMOND DREDGING COMPANY (a Corpo-
ration),

Libellant,

vs.

Dredger "RICHMOND NO. 1," Her Engines,
Boilers, Machinery and Equipment, and
STANDARD AMERICAN DREDGING
COMPANY (a Corporation),

Respondents,

ATLAS GAS ENGINE COMPANY (a Corpora-
tion) and CALIFORNIA RECLAMATION
COMPANY (a Corporation),

Claimants.

COSTS.

Proctor's Docket fee.....	\$20.00
Proctor's fee, \$2.50 for each of twelve deposi- tions read on trial or admitted in evi- dence.....	30.00

DISBURSEMENTS.

Deposited with Clerk of the District

Court... 30.00 23.30

Marshal's fees being Fifty Dollars (less

marshal's check No. 12,279 for

\$3.35, sent by him to J. L. Taugher

November 2d, 1911)... 46.65 92.45

Notary's fees verifying... .50

Stenographer's fees depositions, etc...

357.30 133.20

Witness fees as per schedule... 18.00 6.00

[839]

Clerk's fees (final) Verification Bond.. .75

Marshal's fees (final)... 92.45

Total Costs and Disbursements... \$352.85

306.20.

Taxed at \$306.20.

JAS. P. BROWN.

WITNESS FEES.

Witness.	Residence.	Date. 1911.	Miles.	Attendance Fee, and Mileage.
M. W. Musladin.	Oakland.	Oct. 11.		\$3.00
H. W. Wernse.	San Francisco.	Oct. 13.		6.00
		" 27.		
H. C. Cutting.	Alameda County.	Oct. 13.		
		Oct. 30.		6.00
G. H. Betts.	Richmond.	Oct. 13.		3.00
Total				18.00
				12.00
				6.00

Northern District of California,

City and County of San Francisco,—ss.

H. W. Wernse, being duly sworn, says he is the

Secretary of the Richmond Dredging Company, a corporation, the libelant herein, and makes this affidavit on its behalf; that the foregoing disbursements have been actually made or necessarily incurred herein by said party to deponent's knowledge. That each of the witnesses named in the schedule hereunto annexed, which is made a part hereof, attended on days set opposite their respective names therein. That each and every of said persons named in said schedule was a necessary and material witness on behalf of the party aforesaid on the trial of this action.

H. W. WERNSE. [840]

Sworn to before me this 16th day of February, 1912.

[Seal]

D. B. RICHARDS,

Notary Public in and for the City and County of San Francisco, State of California.

[Endorsed]: Filed Feb. 17, 1912. Jas. P. Brown, Clerk. By M. T. Scott, Deputy Clerk. [841]

Notice of Appeal.

[Style of Court, No. and Title of Cause.]

To the Standard American Dredging Company, a Corporation, Respondent:

To the Standard American Dredging Company, a Corporation, and California Reclamation Company, a Corporation, and Atlas Gas Engine Company, a Corporation, Claimants in the Above-entitled Cause: and,

To Messrs. Jas. S. Spilman and Ira S. Lillick, Proctors for said Respondents and Claimants:

YOU WILL PLEASE NOTICE that libelant,

Standard American Dredging Company et al. 1021

Richmond Dredging Company, hereby appeals to the United States Circuit Court of Appeals for the Ninth Circuit, from the final decree heretofore, and on the 14th day of February, A. D. 1912, given, made and entered in the above cause.

San Francisco, California, August 8th, 1912.

WM. H. H. HART,

Proctor for Libelant and Appellant.

Receipt of a copy of the within Notice of Appeal is hereby admitted this 12th day of August, 1912.

JAS. S. SPILMAN and

IRA S. LILLICK,

Proctors for Respondents and Claimants.

[Endorsed]: Filed Aug. 12, 1912. Jas. P. Brown, Clerk. By M. T. Scott, Deputy Clerk. [842]

[Style of Court, Title and No. of Cause.]

Assignment of Errors.

The libelant and appellant in said cause specifies the following as the errors committed by the District Court of the United States in and for the Northern District of California, First Division, in its decisions and in its decree in said cause.

(1) The said Court erred in sustaining defendant and claimant's exceptions to the second claim of damage alleged in libelant's second amended libel.

(2) The said Court erred in sustaining defendant and claimant's exceptions to the fourth claim of damage set forth in libellant's supplemental libel.

(3) The said Court erred in deciding that the libelant was entitled to the sum of Fifty (50) Dollars

per day for the detention of the dredger "Richmond No. 1," only up to February 3d, 1911.

(4) The said Court erred in not finding and deciding that libelant was entitled to the sum of Fifty (50) Dollars per day for the detention of the dredger "Richmond No. 1," from and including August 16th, 1910, down to and including September 3d, 1911.

(5) The said Court erred in not awarding to the libellant in the decree herein the sum of Fifty (50) Dollars per day for the detention of the dredger "Richmond No. 1," from and including August 16th, 1910, down to and including September 3d, 1911.

(6) The said Court erred in finding and deciding that the hull of the dredger "Richmond No. 1" was not injured in the installation and removal of the Atlas gas engines therefrom.

(7) The Court erred in not finding and deciding that the hull of said dredger "Richmond No. 1" was injured by such installation and removal.

(8) The said Court erred in finding and deciding that the [843] removal and reinstallation of the Samson gas engines from the said dredger, "Richmond No. 1," did not injure the hull of said dredger.

(9) The Court erred in not finding and deciding that the removal and reinstallation of the Samson gas engines from the dredger "Richmond No. 1" did injure and damage the hull of said dredger.

(10) The said Court erred in finding and deciding that the dredger "Richmond No. 1," when tendered to the libelant on February 3d, 1911, was in as good condition reasonable wear and tear excepted,

as when possession was received by the Standard American Dredging Company, under the agreement of February 26th, 1910, and in not finding and deciding that said dredger was not in as good condition.

(11) The said Court erred in not finding and deciding that the Atlas gas engines, when installed on the dredger "Richmond No. 1," became a part of that dredger and that libelant acquired title thereto.

(12) The said Court erred in finding and deciding that the Atlas gas engines, when installed on the dredger "Richmond No. 1" did not become a part of that dredger.

(13) The said Court erred in finding and deciding that the libelant did not acquire title by accession to the Atlas gas engines when they were installed on the dredger "Richmond No. 1."

(14) The said Court erred in finding and deciding that the law of fixtures did not apply to the Atlas gas engines when the same were installed on the dredger "Richmond No. 1," and in not finding and deciding that the libelant obtained title to such gas engines by reason of their having been attached to and forming a part of said dredger.

(15) The said Court erred in finding and deciding that the said Atlas gas engines were only installed on said dredger "Richmond No. 1" for temporary use. [844]

(16) The said Court erred in not finding and deciding that said engines were installed upon said dredger "Richmond No. 1" by the said Standard American Dredging Company, because it had not

kept the Samson gas engines thereon in proper repair.

(17) The said Court erred in finding and deciding that the dredger "Richmond No. 1" was in as good condition on February 3d, 1911, as required by the agreement of February 26th, 1910.

(18) The said Court erred in not finding that said dredger "Richmond No. 1" was not in as good condition on said February 3d, 1911, as required by the said agreement of February 26th, 1910.

(19) The said Court erred in not finding and deciding that the dredger "Richmond No. 1" was out of repair, damaged and useless as a dredger on said February 3d, 1911, when tendered to libelant.

(20) The said Court erred in finding and deciding that it was the duty of the libelant to accept said dredger "Richmond No. 1" when tendered to it by said Standard American Dredging Company on February 3d, 1911.

(21) The said Court erred in finding and deciding that the language: "Abide by and perform the decree of this Court and return the said dredger in the same condition in which it now is and in good repair and shall pay all damages which may be sustained by it by reason of the detention of said dredger." In the undertaking and bond given by the Standard American Dredging Company at the time it received the said dredger "Richmond No. 1" from the marshal in this cause was only intended to secure the libelant the benefit of the final decree of said Court and could not be considered as requiring the said Standard American Dredging

Company to return the said dredger equipped with the Atlas gas engines then on said dredger if the Court should determine in its final decree that such engines were not the property [845] of the libellant or not a part of said dredger.

(22) The said Court erred in not finding and deciding that the above language in the undertaking and bond given by said Standard American Dredging Company, at the time it received the said dredger "Richmond No. 1" from the marshal in this cause, did not require it to return said dredger to the libellant in the precise condition it was in when the said undertaking and bond was given.

(23) The said Court erred in not finding and deciding that the Standard American Dredging Company placed the Atlas gas engines upon the dredger. "Richmond No. 1," because it had worn out beyond repair the Samson gas engines thereon when it received said dredger from libellant.

(24) The said Court erred in not finding and deciding that the said Standard American Dredging Company committed a trespass upon the property of said libellant when it removed the Samson gas engines from the dredger "Richmond No. 1" without libellant's permission, and that by reason thereof any engines it placed on said dredger in the place of said Samson gas engine became the property of the libellant and a fixture to said dredger.

(25) The said Court erred in not finding and deciding that the Standard American Dredging Company committed a trespass on the property of the libellant when it removed the Atlas gas engines from

the dredger "Richmond No. 1" without the permission or knowledge of the libellant.

(26) The said Court erred in not finding and deciding that the Standard American Dredging Company failed to keep in repair said dredger, and failed to keep in repair the Samson gas engines on said dredger "Richmond No. 1," and that by reason of said failure said Standard American Dredging Company was compelled to install said Atlas gas engines in lieu of said Samson gas engines.

(27) The said Court erred in not awarding damages, to wit, the value of the Atlas gas engines to the libellant in the decree [846] herein because of the removal of said Atlas gas engines from the said dredger "Richmond No. 1" by the said Standard American Dredging Company, and also not awarding damages to libellant because of the failure of the said Standard American Dredging Company to keep said dredger "Richmond No. 1" in repair.

(28) The said Court erred in not awarding judgment to the libellant for the possession of the Atlas gas engines removed from the dredger "Richmond No. 1."

(29) Said Court erred in not decreeing that the defendant and claimants herein should restore to the dredger "Richmond No. 1" the Atlas gas engines removed from said dredger.

(30) The Court erred in not finding that the placing of said Atlas gas engines on said dredger "Richmond No. 1" was a repair to said dredger "Richmond No. 1," as required under the charter and contract of February 26th, 1910.

(31) The Court erred in not finding and including in the judgment and decree the sum of Fifty (50) Dollars per day in favor of said libellant and against said Standard American Dredging Company for the rental and detention of the said dredger "Richmond No. 1," from and including August 16th, 1910, down to and including the date of the decree herein, February 12th, 1912.

(32) The Court erred in not finding that the Atlas gas engines were a necessary repair of said dredger "Richmond No. 1."

(33) The Court erred in not finding that all engines and fixtures placed upon said dredger "Richmond No. 1" used in, or for, the operation of said dredger were an accession to said dredger and entitled to remain thereon as a part thereof.

In order that the foregoing assignment of errors may be and appear of record, the said Richmond Dredging Company, the libellant and appellant herein, files and presents the same to the Court, and prays that such disposition be made hereof as is in accordance with the law in such cases made and provided, and said libellant [847] prays that a judgment may be rendered herein as prayed for in its second amended and supplemental libel herein, and for such other and further order as may be deemed proper in the case made.

Dated, San Francisco, California, August 27th, 1912.

WILLIAM H. H. HART,

Proctor for Libellant and Appellant.

H. W. HUTTON,

Advocate for Libellant and Appellant.

Receipt of a copy of the within Assignment of Errors is hereby admitted this 28th day of August, 1912.

JAS. S. SPILMAN, and
IRA S. LILLICK,

Proctors for Defendants, Respondents and Claimants.

[Endorsed]: Filed Aug. 28, 1912. Jas. P. Brown, Clerk. By Francis Krull, Deputy Clerk. [848]

**[Order Directing Transmission of Original Exhibits
to Circuit Court of Appeals.]**

*United States Circuit Court of Appeals for the Ninth
Circuit.*

IN ADMIRALTY.

9999.

RICHMOND DREDGING COMPANY (a Corporation),

Libellant and Appellant,
vs.

Dredger "RICHMOND NO. 1" and STANDARD
AMERICAN DREDGING COMPANY (a
Corporation) et al.,

Claimants, Respondents and Appellees.

It is hereby ordered that the original exhibits in the above cause be forwarded to the above-entitled Appellate Court, on the above appeal.

Dated December 10th, 1912.

JOHN J. DE HAVEN,
District Judge.

[Endorsed]: Filed Dec. 10, 1912. W. B. Maling, Clerk. By C. W. Calbreath, Deputy Clerk. [849]

[Certificate of Clerk U. S. District Court to Apostles, etc.]

I, W. B. Maling, Clerk of the United States District Court, for the Northern District of California, hereby certify the foregoing and hereunto attached 857 pages, lettered from A to H, inclusive, "Statement of Clerk," and numbered 1 to 857, inclusive, with the accompanying exhibits, 28 in number (which are transmitted under separate cover), contain a full, true, and correct transcript of the record in the said District Court, made up pursuant to, and in accordance with "Stipulation and Order as to Record on Appeal," embodied in the transcript, and the instructions of H. W. Hutton, Esquire, on behalf of W. H. H. Hart, Esquire, Proctor for Appellants in the cause entitled; Richmond Dredging Company, a Corporation, vs. Dredger "Richmond No. 1," Her Tackle, Machinery, etc., and Standard American Dredging Company, a Corporation, et al., etc., Number 15072.

I further certify that the costs of preparing and certifying to the foregoing Transcript of Appeal is the sum of \$473.00, and that the same has been paid to me by said W. H. H. Hart, Esquire, Proctor as aforesaid.

In witness whereof, I have hereunto set my hand and affixed the seal of said District Court this 13th

1030 *Richmond Dredging Company vs.*

day of December, A. D. 1912.

[Seal]

WALTER B. MALING.

Clerk. [850]

[Endorsed]: No. 2208. United States Circuit Court of Appeals for the Ninth Circuit. Richmond Dredging Company, a Corporation, Appellant, vs. Standard American Dredging Company, a Corporation, California Reclamation Company, a Corporation, and Atlas Gas Engine Company, a Corporation, Appellees. Apostles. Upon Appeal from the United States District Court for the Northern District of California, First Division.

Filed December 13, 1912.

F. D. MONCKTON,

Clerk of the United States Circuit Court of Appeals
for the Ninth Circuit.

[Order Extending Time to December 13, 1912, to File
Apostles on Appeal.]

*United States Circuit Court of Appeals for the Ninth
Circuit.*

IN ADMIRALTY.

RICHMOND DREDGING COMPANY, a Corpora-
tion,

Libellant and Appellant,

vs.

Dredger "RICHMOND NO. 1" and STANDARD
AMERICAN DREDGING COMPANY (a
Corporation) et al.,

Claimants, Respondents and Appellees.

Good cause appearing therefor, it is hereby ordered that the time to file the Apostles on the above appeal from the District Court of the United States in and for the Northern District of California in the above-entitled Appellate Court, is hereby extended for three days from and after the 10th day of December, 1912.

Dated December 10th, 1912.

JOHN J. DE HAVEN,
District Judge.

[Endorsed]: No.—. United States Circuit Court of Appeals, for the Ninth Circuit. In Admiralty. Richmond Dredging Company, etc., Appellant, etc., vs. Dredger Richmond No. 1, etc., et al., Appellees, etc. Order Extending Time to File Apostles on Appeal. Filed Dec. 10, 1912. F. D. Monckton, Clerk.

United States District Court, Northern District of California, First Division.

Certificate of Clerk, District Court, as to Exhibits.

United States of America,
Northern District of California,—ss.

I, W. B. Maling, Clerk of the District Court of the United States for the Northern District of California, do hereby certify that the annexed documents (28) in number are original exhibits, introduced in the case of Richmond Dredging Company, a Corporation, vs. Dredger "Richmond No. 1," etc., et al., No. 15,072, and are herewith transmitted to the Circuit Court of Appeals for the Ninth Cir-

cuit, as per stipulation and order filed in this court and embodied in the Apostles on Appeal herewith, and which said exhibits are known as and called:

Libelant's Exhibit No. 1 (Musladin Examination).

Libelant's Exhibit No. 2 (").

Libelant's Exhibit No. 3 (Wernse Examination).

Libelant's Connor Exhibit "A" (Letter, Jan. 27, 1910).

Libelant's Exhibit Connor No. 1 (Letter, May 26, 1909).

Libelant's Exhibit Connor No. 2 (Letter, Feb. 4th, 1910).

Cummin's Exhibit No. 1 (Contract).

Cummin's Exhibit No. 2 (Letter, June 23, 1908).

Cummin's Exhibit No. 3 (Agreement).

Cummin's Exhibit No. 4 (").

Claimant's Exhibit No. 4 (Agreement).

Claimant's Exhibit No. 5 (Lease).

Claimant's Exhibit No. 6 (Letter, June 29, 1910).

Claimant's Exhibit No. 7 (Bills).

Claimant's Exhibit No. 8 (Bills).

Claimant's Exhibit No. 9 (Letter, Aug. 16, 1910).

Claimant's Exhibit No. 10 (Letter, Aug. 16, 1910).

Claimant's Exhibit No. 11 (Notice demanding return of dredger, etc.).

Claimant's Exhibit No. 12 (Letter, July 14th, 1910).

Claimant's Exhibit No. 13 (Letter, Jan. 5, 1911).

Claimant's Exhibit No. 14 (Letter, Jan. 6, 1911).

Claimant's Exhibit No. 16 (Letter, Feb. 6, 1911).

Claimant's Exhibit No. 17 (Letter, June 18, 1910).

Claimant's Exhibit No. 18 (Letter, Aug. 12, 1910).

Claimant's Exhibit No. 19 (Letter, Sept. 3, 1910).

Standard American Dredging Company et al. 1033
Claimant's Exhibit No. 20 (Letter, Sept. 6, 1910).
Wernse Exhibit "A" in Rebuttal (Letter, Feb. 9,
1910).

Connor's Exhibit 1 in Surrebuttal (Agreement).

IN WITNESS WHEREOF, I have hereunto set my
hand and affixed the seal of said District Court this
13th day of December, A. D. 1912.

[Seal]

WALTER B. MALING,
Clerk.

Libelant's Exhibit 3—Wernse Examination.

THIS AGREEMENT made and entered into this
18th day of October 1909, by and between the RICH-
MOND DREDGING COMPANY, a Corporation
having its principal place of business in San Fran-
cisco, California, party of the first part, and Stand-
ard American Dredging Company, a Corporation
having its principal place of business in San Fran-
cisco, California, party of the second part,

WITNESSETH:

That whereas the party of the first part is the
owner of a suction dredge named "Richmond No. 1"
and its equipment; and

Whereas, the party of the second part is desirous
of renting said dredge and equipment and to oper-
ate same, the parties hereto have entered into the
following agreement to wit:

For and in consideration of the sum of Eight
Hundred (\$800.00) dollars per month, cash, payable
on the 19th day of each and every month for the pre-
ceding month, to be paid by the party of the second

part to the party of the first part, said party of the first part agrees to rent to the party of the second part the said dredge and equipment from R. A. P.
H. W. W. October 19th, 1909 to January ~~20th~~ 1910.

The party of the second part agrees to pay to the party of the first part on the 19th day of each month the rent for the preceding month, and further agrees to the following terms and conditions.

To accept the dredge with all equipment, where same now is and to pay all moving expenses; to use the utmost care in moving said dredge so as to cause no strain to the hull, and agrees to repair any and all damage and keep in repair, at its own sole expense; at all times to have responsible engineers in charge of the engines and to return the dredge to and in the Canal at Richmond in as good condition and repair as same now is, viz, in condition to immediately start work, reasonable wear and tear and loss or injury by fire excepted, and to pay all expenses of any and all repairs to hull, equipment or machinery, except such as may be made necessary by fire, it being understood and agreed that the party of the second part assumes no risk for loss or injury to said dredger or equipment by fire, but assumes all risk for loss or injury H. W. W.
R. A. P. from any other cause.

All pipe used in the dredging operations at Lake Merritt is the property of the Richmond Dredging Company and will be delivered as part of the equipment, to and in said Canal at Richmond at the expense of the party of the second part. Repairs on the dredge or equipment to be made at the expense

of the party of the second part, except as hereinbefore provided.

The party of the first part to have the right to board dredge at any time for the purpose of inspection.

Rent to commence on the 19th day of October, 1909, and to be paid promptly on the 19th of each month thereafter.

Said second party further agrees to deliver dredge, pipe and all equipment, to and in the Canal at Richmond by the ~~31st~~ day of January, H. W. W.
R. A. P.

1910, otherwise rent will be charged
H. W. W.
R. A. P. therefor at the rate of ~~Fifty (\$50.00)~~ Dollars per day.

The value of said dredge at this time is H. W. W.
R. A. P.
Thirty Thousand Dollars (\$30,000).

IN WITNESS WHEREOF, the parties have hereunto set their hands and seals this 18th day of October 1909.

RICHMOND DREDGING COMPANY,

By H. W. WERNSE, Sec.

STANDARD AMERICAN DREDGING
COMPANY,

By R. A. PERRY, President.

Memoranda—I personally Guarantee the above contract.

Oct. 25 '09.

R. A. PERRY.

[Endorsed]: Case No. 2208. U. S. Circuit Court of Appeals for the Ninth Circuit. Libelant's Exhibit 3. Received Dec. 13, 1912. F. D. Monekton, Clerk.

Cummins Exhibit 1.**CONTRACT FOR THE IMPROVEMENT OF SAN RAFAEL CREEK.**

THIS CONTRACT AND AGREEMENT made and entered into this 15th day of April, A. D. 1908, by and between the State of California, through N. Ellery, State Engineer, the *part* of the first part and the CALIFORNIA RECLAMATION COMPANY, a corporation, party of the second part,

WITNESSETH, that whereas, the said party of the first part heretofore duly advertised for bids for dredging, excavating and clearing out the channel of San Rafael Creek, according to specifications prepared by and filed in the office of the Department of Engineering, a copy whereof is hereto attached and made part of this agreement the same as though said specifications appeared in full in the body hereof, and whereas, in accordance with law and the advertisements inviting proposals or bids for executing said work, and said party of the second part did furnish and file with the said Department of Engineering, within the time stipulated therefor, their bid or proposal to furnish all of the plant, labor and materials and do all the work required for dredging, excavating and clearing out the said channel of San Rafael Creek in conformity with the plans and specifications aforesaid for the sum of five and eighty nine one hundredths (5.89) cents for each cubic yard of earth material so dredged or excavated, and said proposal being the lowest bid offered, and being in compliance with the advertisement and specifica-

tions aforesaid, the said party of the first part, by the said State Engineer duly accepted and approved said bid and notified said party of the second part of the acceptance thereof, and now the parties hereto, in accordance with law and the matters hereinabove set forth, hereby agree as follows, to wit:

The party of the second part, a corporation organized and existing under and by virtue of the laws of the State of California, in consideration of the agreement and covenants of the party of the first part hereinafter set forth, agrees to furnish at his own proper cost and expense all necessary machinery, tools, plant, labor and materials to dredge, excavate and clear out the aforesaid channel of San Rafael Creek in accordance with the said specifications hereto attached, and the second party further agrees that the State Engineer and his authorized agents shall, and is hereby authorized to inspect or cause to be inspected the work done under this agreement and to require that the same correspond to the terms of the annexed specifications and it is further agreed between the said parties that no branch sloughs or streams emptying into the said San Rafael Creek shall be interfered with in compliance with the permit granted the State of California by the U. S. War Department, for the aforesaid dredging work, and it is further agreed that the party of the second part shall furnish the said first party with satisfactory evidence that all persons who have done work or furnished materials or supplies at the request of the said second party under this agreement, have been fully paid and in

case such evidence be not furnished as aforesaid, such amount as the party of the first part may consider necessary and proper to meet lawful claims of the persons aforesaid shall be retained from any money due or to become due the party of the second part under this agreement until the liabilities aforesaid shall have been fully discharged and the evidence thereof furnished the said party of the first part; and said second party further agrees to furnish the party of the first part a good and sufficient bond to be approved by the aforesaid State Engineer in the sum of Two Thousand (\$2,000.00) Dollars for the faithful performance of this agreement and conditioned to indemnify and save the State or its agents against any suits for damages on account of injuries through negligence on the part of the party of the second part or their agents in consequence of any work done hereunder. The said party of the second part further agrees to furnish the party of the first part a good and sufficient bond to be approved by the aforesaid State Engineer in the sum of Four Thousand Five Hundred (\$4,500.00) Dollars, to be known as a Labor and Material Bond and which must conform to the required law for such bond. The said party of the second part agrees to take and receive the said sum named in his bid, to wit: five and eighty nine one hundredths (5.89) cents per cubic yard for material excavated as full compensation for the furnishing of all labor and material, and in all respects completing the aforesaid work in the manner and under the conditions herein specified, and as full compensation for all loss or

damages arising out of the nature of the work aforesaid, or for any unforeseen obstructions or difficulties which may be encountered in the prosecution of the said work, and for all loss and expense incurred by or in consequence of the suspension or discontinuance of said work, and for well and faithfully completing said work in seventy five working days from the date of being notified to commence the said work by the State Engineer of the State of California.

It is further agreed by the parties hereto that the quantity of earth material removed shall be determined by the Department of Engineering, and payments shall be made therefor by the party of the first part, at the times and in the manner stipulated in the before-mentioned specifications.

And said second party further agrees to not assign, transfer or sublet this contract without the written consent of said first party, and that such assignment, transfer or subletting made without such consent having been first obtained shall in every case be absolutely void.

The party of the second part further agrees that should the work not be completed within the time hereinbefore stipulated and provided in the said annexed specifications, there shall be deducted from the contract price of said work, as liquidated damages, the sum of Ten Dollars (\$10.00) for each and every day of such delinquency.

It is further agreed and stipulated between the respective parties hereto that the party of the second part shall forfeit as penalty to the State of Cali-

for each laborer, workman or mechanic employed in the execution of this contract for each calendar day during which such laborer, workman or mechanic is employed or permitted to labor more than eight (8) hours per shift.

It is further stipulated and agreed between the respective parties hereto that the minimum compensation to be paid for labor by said party of the second part on the work performed under this agreement shall not be less than Two Dollars (\$2.00) per day.

It is further expressly agreed by and between the parties hereto that should there be any conflict between the terms of the instrument and the bid or proposal of the said second party, then this instrument shall control and nothing herein shall be considered as an acceptance of the said terms of said proposal conflicting therewith. Both parties hereto agree to be and are hereby bound by the terms and provisions of the annexed specifications.

IN WITNESS WHEREOF, these presents have been executed on behalf of the party of the first part by the State Engineer, and on behalf of the party of the second part by ———.

STATE OF CALIFORNIA.

By N. ELLERY,

State Engineer.

CALIFORNIA RECLAMATION CO.

[Seal]

R. A. PERRY.

President.

STATE OF CALIFORNIA.
DEPARTMENT OF ENGINEERING.
SACRAMENTO.

Nathaniel Ellery,
State Engineer,
Sacramento, Cal.

Sir:—

—— the undersigned, hereby propose to furnish all of the plant, labor and materials, and do all the work required for dredging, excavating and clearing out the channel of San Rafael Creek, in conformity with the terms of the advertisement, plans and specifications relating thereto, copies of each of which are hereto attached, for the following sums to wit:—

For each cubic yard of earth material dredged, excavated or removed as aforesaid, the sum of

I purpose to use for said work a dredge or machine of the —— type, and for the above stipulated price per cubic yard I can and will deposit all material so removed at any distance required, not to exceed —— feet, measured laterally, from the center line of the excavation.

(Signed)

Dated at —— this —— day of ——, 1908.

STATE OF CALIFORNIA.
DEPARTMENT OF ENGINEERING.
SACRAMENTO.

SPECIFICATIONS FOR THE IMPROVEMENT
OF SAN RAFAEL CREEK, MARIN COUNTY,
CALIFORNIA.

(1) LOCATION.

The work to be executed under these specifications is located in the channel of San Rafael Creek, a navigable tidal stream connecting with the Bay of San Francisco.

(2) MAP AND DRAWING.

A certain map or drawing prepared by the Department of Engineering, State of California, entitled "San Rafael Creek Improvement, Drawing 2-30-15," is hereby referred to and made part of these specifications.

(3) CHARACTER OF WORK.

The work herein contemplated will consist of dredging, excavating and cleaning out the channel of said San Rafael Creek so as to facilitate navigation therein.

(4) EXTENT OF WORK.

The work to be executed hereunder is defined, for the purpose of receiving bids and awarding contracts therefor, as extending from a point in the channel of said San Rafael Creek, designated upon the drawing hereinbefore mentioned, as Station 25, and following the meanders of the stream to a point near its mouth, opposite a certain levee and bulkhead, delineated on said drawing, and terminating at Station 81+33,

shown thereon. The total distance between said points is approximately 7,000 linear feet.

Any extension of said work beyond the limits above stated, ordered by the State Engineer to be made, shall be executed the same and shall be paid for at the same price as similar work within the said limits.

(5) DIMENSIONS.

The dimensions of the cut or excavation to be made hereunder will be 60 feet wide on the bottom with a depth of four feet below mean low tide, and with side slopes of 2 to 1.

(6) MEASUREMENT OF WORK.

For the information of bidders it is here stated that from a preliminary survey made by the Department of Engineering, it is estimated that the quantity of material to be excavated will be approximately 131,000 cubic yards.

The true quantity of material to be excavated will be determined from cross-sections of the channel measured before excavation is commenced and the true quantity moved will be found by measurements of the channel after being excavated. All measurements will be expressed in terms of cubic yards.

(7) DISPOSAL OF SPOIL.

The material to be excavated under these specifications shall be placed at the side of the channel excavated upon the bank or banks thereof or upon the lands adjacent thereto as may be directed by the Department of Engineering.

(8) METHODS OF WORK.

Bidders making proposals to execute the work

herein contemplated shall state in their respective bids the price per cubic yard of material to be moved;

The type of dredge or machine they purpose to employ in the work;

The maximum distance from the middle line of the excavated channel to which they propose delivering the material for the price named in their respective bids.

(9) FEDERAL AUTHORITY.

Application has been made by the State to the United States for authority to execute the work herein specified, and all bids received or contracts awarded thereunder will be contingent upon the authority to do the work being granted by the United States War Department.

GENERAL CONDITIONS.

PLANS FOR CONTRACTOR.

The Contractor will be furnished with a set of the drawings and specifications. No deviation from either the drawings or specifications will be allowed without the written permission of the State Engineer.

EXAMINATION OF WORK.

The Contractor must furnish all facilities to the State Engineer, or his agent, to examine and determine whether the contract is being carried out as specified. Upon the request of the State Engineer or his agent, the Contractor must furnish him or them any data or information that in any way concerns this work under this contract.

CONTRACTOR'S DUTY.

The Contractor must abide by and comply with the obvious intent and meaning of these specifications, which shall be construed to include all modes of work necessary to complete the work herein specified in a thorough and workmanlike manner.

ERRORS OR OMISSIONS.

The Contractor will not be allowed to take any advantage of any error or omission in these specifications, as full instructions will be given him should any error or omission be discovered.

DISPUTES.

All work must be done under the general supervision and to the satisfaction of the State Engineer; and all questions and disputes with regard to the intent and interpretation of these specifications shall be referred to him, and his decision thereon shall be final.

NON-COMPLIANCE WITH SPECIFICATIONS.

Should any portion or portions of the work be done not in accordance with these specifications the Contractor shall, at his own expense, redredge such portion or portions of deficient work without loss or damage to the State.

DISORDERLY EMPLOYEES.

If any person employed by the Contractor on this work shall appear to be incompetent or disorderly, he shall be discharged immediately on the requisition of the State Engineer, or his agent, and such person shall not again be employed on the work.

INSUFFICIENT EMPLOYEES.

Should the Contractor have an insufficient number of employees on the work, or should he or they cause delays by an insufficient number of laborers, the State Engineer shall employ such additional competent help as may be necessary to meet the requirements of time provisions herein contained. However, before the State Engineer may employ such help, he shall obtain the consent of the Advisory Board to the State Department of Engineering. The Contractor shall pay such additional help in the same manner and at the same time as his other employees are paid.

NON-RESPONSIBILITY OF STATE.

The Department of Engineering, its officers, and the State shall not be responsible for any loss or damage that may happen to the work, or to any part or parts thereof, or for injuries or loss of life to persons in the employ of the Contractor, or the public.

NON-LIABILITY OF STATE.

All bills incurred by the Contractor for the employment of labor, purchase of material, or any other matter in connection with the work provided for in these specifications, must be paid by said Contractor, and the State of California is hereby expressly relieved from any indebtedness or claim due to any person other than the Contractor for any amount of money over and above the contract price.

ALTERATIONS.

No work herein specified shall be changed or omitted excepting upon the written order of the

State Engineer. Additional work shall be allowed only upon the written order of the State Engineer. The price to be added to or subtracted from the contract price on account of any added, changed or omitted work shall be as mutually agreed upon and stipulated in the order authorizing such addition, change or omission.

WORKMANSHIP.

All work done hereunder must be done in a thorough, workmanlike manner, and upon completion all tools and plant must be removed by the Contractor.

TIME OF WORK.

The whole work must be completed in seventy-five (75) working days.

TIME OF BEGINNING WORK.

The bidder to whom the contract for this work shall be awarded shall immediately, upon receipt of the written order of the State Engineer, begin the work herein specified and prosecute the same diligently to its completion, within the time stipulated

DELAYS.

Time lost due to strikes, riots, stress of weather, or other extraordinary circumstances beyond the control of the Contractor, may be added to the stipulated time for the commencement or completion of the work, provided that the State Engineer shall have approved an application for such extension of time made in writing to him at or before the time said delay shall begin.

DAMAGES.

If any Contractor shall fail to commence or to

complete his work at or within the time stipulated, including extensions of time granted as aforesaid, there shall be deducted from the contract price of said work, as liquidated damages, the sum of Ten Dollars (\$10) for each and every day of such delinquency.

WAGE RATE AND HOURS.

In pursuance of the laws of California, the contract shall contain a stipulation that eight hours shall constitute a day's labor in all work done thereunder, and that the rate of wages shall not be less than two dollars (\$2.00) per day.

SAFEGUARDS.

The Contractor shall use all necessary precaution to prevent accidents to persons and property, and shall be responsible for all loss, damage or injury to persons or property, or to the work, due to the nature of the work, or to the action of the elements.

WORKING DIMENSIONS.

Figured dimensions as they appear on the plans, diagrams and drawings, and not scaled dimensions, will be used.

INSTRUCTIONS TO BIDDERS.

REJECTION OF BIDS.

The State Engineer reserves the right to reject any and all bids and to waive any informality in any bid received.

ADDRESS FOR BID.

All bids shall be inclosed in sealed envelopes and addressed "N. Ellery, State Engineer, Sacramento,

California," and marked "Proposal for Dredging San Rafael Creek."

BIDS, ETC.

One copy of the advertisement and the specifications must be securely attached to each bid, and considered as comprising a part thereof.

CHECK FOR CASH BOND.

Each bid must be accompanied by a certified check in the sum of at least ten per cent of the total bid, payable to the order of N. Ellery, State Engineer, and drawn on some established and solvent bank doing business in the State of California. Before awarding the contract, all of said checks deposited by the unsuccessful bidders shall be returned to them by the said State Engineer. The check deposited by the successful bidder shall be retained by the State Engineer until the contractor shall have fully qualified with a bond as hereinafter stipulated.

CONTRACT AND BOND.

The bidder to whom the contract shall be awarded shall within five days after being notified of the acceptance of his bid enter into a contract with the State Engineer in accordance with his bid for the work herein contemplated, and shall at the same time furnish a good and sufficient bond in the sum of two thousand dollars (\$2,000.00) for the faithful performance of said contract according to the true intent of the plan and these specifications. Said contract and bond to be approved according to law before any work shall be commenced thereunder. Failure to enter into such contract within the said

limit of time shall cause forfeiture of the certified check deposited with the bid to the State of California.

FORM OF BID.

All bids shall be upon forms furnished by the office of the State Department of Engineering.

BID FOR WORK.

Each bidder must state in his proposal the specific sum for which he will perform each unit of work as described in the form of proposal herewith, and as required by these specifications.

DATA FOR BIDS.

Data for the calculation of bids can be obtained upon application to the Department of Engineering, and further, it is presumed that the bidder will visit the place of work that he may estimate the facilities and difficulties attending the execution of the contemplated work.

ACCEPTANCE AND PAYMENTS.

ACCEPTANCE.

The work shall not be accepted until the whole shall have been completed to the satisfaction of the Department of Engineering and in accordance with the plans and specifications.

PARTIAL PAYMENTS.

After each 25 days of work by the Contractor under these specifications, an estimate of the amount of work accomplished shall be made by the State Engineer and 80% of said estimate shall be paid from the proper and available funds.

FINAL PAYMENT.

When the work is completed and certified to by the Department of Engineering, the 20% retention money and the final payment shall be made. The bond for the faithful performance of the work shall continue in full force and effect during 35 days after acceptance pending any discovery of non-compliance with the plans and specifications during said thirty-five days.

[Endorsed]: Case No. 2208. Circuit Court of Appeals, for the Ninth Circuit. Cummins Exhibit 1. Received Dec. 13, 1912. F. D. Monckton, Clerk.

Cummins Exhibit No. 3.

This Agreement, made and entered into this ——— day of February, 1910, by and between the STANDARD AMERICAN DREDGING COMPANY, a corporation, the party of the first part, and RICHMOND DREDGING COMPANY, a corporation, the party of the second part,

WITNESSETH:

Whereas, the party of the first part is the owner of the electric dredger "Oakland," and the party of the second part is desirous of hiring said dredger to be used for filling on certain lands at and near Richmond, California, under a contract between the party of the second part, and the Richmond Canal & Land Company and other; and

Whereas, the party of the second part is the owner of the suction dredger called the "Richmond No. 1"

now in the possession of the party of the first part under a charter between the parties hereto, bearing date the 18th day of October, 1909, and the party of the first part is desirous of continuing the possession and use of said dredger "Richmond No. 1," as hereinafter provided:

IT IS HEREBY AGREED:

1. The party of the first part hereby lets and leases unto the party of the second part, and the party of the second part hereby hires and takes from the party of the first part, the said electric dredger "Oakland" to be used for the filling of the said lands, at and near Richmond, California, for the term of sixty (60) days from and after this date, at a **minimum** rental of eight hundred dollars (\$800), a month which shall pay for the use of said dredger "Oakland" not more than one shift, not exceeding twelve (12) hours each day; and if at any time during said term, said dredger shall be operated more than twelve (12) hours in any day, the party of the second part shall pay the party of the first part an additional rental at the rate of eight hundred dollars (\$800) a month for the extra time of operation.

2. The party of the first part agrees to deliver said dredger "Oakland" with her equipment, at Point Richmond, on or before the — day of February, 1910.

3. From the time of the receipt of said dredger by the party of the second part until the return of said dredger to the party of the first part, at the ex-

piration of the term of this agreement (or any extension of said term), the party of the second part shall be responsible to the party of the first part for the said dredger in any event, and agrees to return said dredger to the party of the first part in as good order and condition as the same shall be at the beginning of the term of this agreement, reasonable wear and tear thereof, and damage by fire, only excepted.

4. The party of the second part also agrees that during the term of this agreement it will pay all charges for labor, electric current, supplies, repairs, and all other expenses of any kind and character whatsoever in and about the operation of the said dredger "Oakland"; and also hold the said dredger "Oakland" and the party of the first part, harmless from any debts that accrue from any of the expenses aforesaid, or from any act or omission of the party of the second part.

5. Said party of the second part shall have no authority to incur any obligations whatsoever on the credit of said dredger "Oakland," or on the credit of the party of the first part. In the event that any claim of lien, or other claim or demand shall be asserted by anyone whatsoever, against the said dredger "Oakland," or the party of the first part, on account of any indebtedness or other liability incurred by the party of the second part, or arising out of any act or omission of the party of the second part, said party of the second part shall, and hereby agrees that it will, promptly pay and dis-

charge the same, and will also pay to the party of the first part all costs, expenses and attorneys' fees that shall be incurred by the party of the first part on account thereof, and all damages that may be sustained by the party of the first part by reason thereof.

6. The performance by the party of the second part of the covenants, terms and conditions contained in the foregoing paragraphs numbered 3, 4, and 5 shall be secured by a bond in the sum of five thousand dollars (\$5,000), with a surety company as surety; and this agreement shall not take effect until said bond be given to and approved by the party of the first part.

7. In consideration of the execution of this agreement, all claim of the party of the second part to increased rental, or other charge, by reason of the detention of the "Richmond No. 1" beyond the term of the said charter, is hereby waived; and the term of said charter, as modified by this agreement, is hereby extended, at the rental of eight hundred dollars a month, for the term of sixty days from this date, and for such further time as shall be fixed and determined as hereinafter provided; and the rental of said dredger "Richmond No. 1" earned and to be earned, shall be applied as an offset to the rental of the dredger "Oakland" as far as it will go.

8. If at the expiration of the said term of sixty (60) days the party of the first part shall not have found any other work that it desires to do with said dredger "Oakland," this agreement may, at the op-

tion of the second party, be extended thereafter until the party of the second part shall have completed such amount of filling as may be desired by the party of the second part on the lands aforesaid, not exceeding a total of 400,000 cubic yards of material including the filling that shall theretofore have been done by the use of said dredger "Oakland," under this agreement, or until the party of the first part shall have given the party of the second part fifteen (15) days' notice of termination of this agreement.

9. If at any time during the term of this agreement, or any extension thereof, the party of the first part shall secure work which it desires to do by the use of said dredger "Oakland," it may, at its option either require the party of the second part, after fifteen (15) days' notice in writing to operate said dredger "Oakland" twenty-four (24) hours each day until 400,000 cubic yards of filling (including all filling previously done by the "Oakland") shall have been completed or to terminate this lease of the said dredger "Oakland" by giving the party of the second part fifteen (15) days' notice of such termination, and returning the dredger "Richmond No. 1" to the party of the second part as in said charter provided, or paying the party of the second part at the rate of fifty (50) dollars a day for said "Richmond No. 1" for all time it shall be retained by the party of the first part after the expiration of said fifteen (15) days' notice, and the return of the "Oakland" to the party of the first part.

10. If the party of the first part shall permit the party of the second part to retain the "Oakland" for long enough to complete 400,000 cubic yards of filling on the lands aforesaid, or if the party of the second part shall fail after notice to that effect to operate said dredger "Oakland," continuously twenty-four hours each day until 400,000 cubic yards of filling shall have been done (in which case the party of the first part may terminate this lease and retake possession of the "Oakland" without being required to return the "Richmond No. 1" or to pay any extra rental therefor) the party of the first part shall have, and is hereby granted, an option to retain the said "Richmond No. 1" at the rental of eight hundred dollars (\$800) a month for such length of time as it may desire to retain the same, but not beyond the first day of January, 1911.

11. The party of the first part shall have the right to nominate the superintendent and chief engineer, who shall be employed and paid by the party of the second part in the operation of the said dredger "Oakland" under this agreement; and said dredger shall not at any time be operated by the party of the second part except when in charge of a superintendent and a chief engineer selected by the party of the first part.

12. The rental of the dredger "Oakland" shall be due and payable to the party of the first part on the 19th day of each month for the last preceding month; and the party of the second part agrees that on the 19th day of each month it will pay said rental to the party of the first part, after deducting the

Standard American Dredging Company et al. 1057
rental, if any, then due for the dredger "Richmond No. 1." Time is of the essence of this provision.

13. It is agreed that the value of the said dredger "Oakland" is the sum of one hundred and fifty thousand dollars (\$150,000).

IN WITNESS WHEREOF the parties hereto have hereunto subscribed their names, and affixed their corporate seals, by their officers thereunto duly authorized, the day and year first above written.

STANDARD AMERICAN DREDGING
COMPANY.

By _____.

By _____.

RICHMOND DREDGING COMPANY.

By _____.

[Endorsed]: Agreement. Standard American Dredging Company with Richmond Dredging Company. Dated February, 1910.

Case No. 2208. U. S. Circuit Court of Appeals for the Ninth Circuit. Cummins Exhibit 3. Received Dec. 13, 1912. F. D. Monckton, Clerk.

Cummins Exhibit No. 4.

THIS AGREEMENT, made and entered into this 26th day of February, 1910, by and between the STANDARD AMERICAN DREDGING COMPANY, a corporation, the party of the first part, and RICHMOND DREDGING COMPANY, a corporation, the party of the second part,

WITNESSETH:

Whereas, the party of the first part is the owner

of the electric dredger "Oakland," and the party of the second part is desirous of hiring said dredger to be used for filling on certain lands at and near Richmond, California, under a contract between the party of the second part, and the Richmond Canal & Land Company and other; and

Whereas, the party of the second part is the owner of the suction dredger called the "Richmond No. 1" now in the possession of the party of the first part under a charter between the parties hereto, bearing date the 18th day of October, 1909, and the party of the first part is desirous of continuing the possession and use of said dredger "Richmond No. 1," as hereinafter provided:

IT IS HEREBY AGREED:

1. The party of the first part hereby lets and leases unto the party of the second part, and the party of the second part hereby hires and takes from the party of the first part, the said electric dredger "Oakland" to be used for the filling of the said lands, at and near Richmond, California, for the term of sixty (60) days from and after this date, at a minimum rental of eight hundred dollars (\$800.), a month which shall pay for the use of said dredger "Oakland" not more than one shift, not exceeding twelve (12) hours each day; and if at any time during said term, said dredger shall be operated more than twelve (12) hours in any day, the party of the second part shall pay the party of the first part an additional rental at the rate of eight hundred dollars (\$800.) a month for the extra time of operation.

2. The party of the first part agrees to deliver

said dredger "Oakland" with her equipment, at Point Richmond, on or before the 26th day of February, 1910.

3. From the time of the receipt of said dredger by the party of the second part until the return of said dredger to the party of the first part, at the expiration of the term of this agreement, (or any extension of said term), the party of the second part shall be responsible to the party of the first part for the said dredger in any event, and agrees to return said dredger to the party of the first W. A. H. C. at Richmond

part in as good order and condition as the same shall be at the beginning of the term of this agreement, reasonable wear and tear thereof, and damage by fire, only excepted.

4. The party of the second part also agrees that during the term of this agreement it will pay all charges for labor, electric current, supplies, repairs, and all other expenses of any kind and character whatsoever in and about the operation of the said dredger "Oakland"; and also hold the said dredger "Oakland" and the party of the first part, harmless from any debts that accrue from any of the expenses aforesaid, or from any act or omission of the party of the second part.

5. Said party of the second part shall have no authority to incur any obligations whatsoever on the credit of said dredger "Oakland," or on the credit of the party of the first part. In the event that any claim of lien, or other claim or demand shall be asserted by any one whatsoever, against the said

dredger "Oakland," or the party of the first part, on account of any indebtedness or other liability incurred by the party of the second part, or arising out of any act or omission of the party of the second part, said party of the second part shall, and hereby agrees that it will, promptly pay and discharge the same, and will also pay to the party of the first part all costs, expenses and attorneys' fees that shall be incurred by the party of the first part on account thereof, and all damages that may be sustained by the party of the first part by reason thereof.

6. The performance by the party of the second part of the covenants, terms and conditions contained in the foregoing paragraphs numbered 3, 4, and 5 shall be secured by a bond in the sum of five thousand dollars (\$5000.), with a surety company as surety; and this agreement shall not take effect until said bond be given to and approved by the party of the first part.

7. In consideration of the execution of this agreement, all claim of the party of the second part to increased rental, or other charge, by reason of the detention of the "Richmond No. 1" beyond the term of the said charter, is hereby waived; and the term of said charter, as modified by this agreement, is hereby extended, at the rental of eight hundred dollars a month, for the term of sixty days from this date, and for such further time as shall be fixed and determined as hereinafter provided; and the rental of
W. A. H. C. said dredger "Richmond No. 1" ~~earned and~~
to be earned, shall be applied as an offset to

the rental of the dredger "Oakland" as far as it will go.

8. If at the expiration of the said term of sixty (60) days the party of the first part shall not have found any other work that it desires to do with said dredger "Oakland," this agreement may, at the option of the second party, be extended thereafter until the party of the second part shall have completed such amount of filling as may be desired by the party of the second part on the lands aforesaid, not exceeding a total of 400,000 cubic yards of material including the filling that shall heretofore have been done by the use of said dredger "Oakland," under this agreement, or until the party of the first part shall have given the party of the second part fifteen (15) days notice of termination of this agreement.

9. If at any time during the term of this agreement, or any extension thereof, the party of the first part shall secure work which it desires to do by the use of said dredger "Oakland," it may, at its option either require the party of the second part, after fifteen (15) days notice in writing to operate said dredger "Oakland" twenty-four (24) hours each day until 400,000 cubic yards of filling (including all filling previously done by the "Oakland") shall have been completed or to terminate this lease of the said dredger "Oakland" by giving the party of the second part fifteen (15) days notice of such termination, and returning the dredger "Richmond No. 1" to the party of the second part as in said charter provided, or paying the party of the second part at the rate of fifty (50) dollars a day for said "Richmond

No. 1" for all time it shall be retained by the party of the first part after the expiration of said fifteen (15) days notice, and the return of the "Oakland" to the party of the first part.

10. It is hereby mutually agreed and understood that the rent of said dredger "Richmond No. 1" shall be eight hundred (800) dollars per month, and that the said first party shall have the right to lease and use said dredger "Richmond No. 1" at any and all periods when not in use or required by the party of the second part until January 1st, 1911.

H. W. W.
W. A. H. C.
H. C. C.
W. A. H. C.

11. The party of the first part shall ~~have~~ ~~the right to~~ nominate the captain and chief engineer, who shall be employed and paid by the party of the second part in the operation of the said dredger "Oakland" under this agreement; and said dredger shall not at any time be operated by the party of the second part except when in charge of a captain and chief engineer selected by the party of the first part.

12. The rental of the dredger "Oakland" shall be due and payable to the party of the first part on the 19th day of each month for the last preceding month; and the party of the second part agrees that on the 19th day of each month it will pay said rental to the party of the first part, after deducting the rental, if any, then due for the dredger "Richmond No. 1." Time is of the essence of this provision.

13. It is agreed that the value of the said dredger "Oakland" is the sum of one hundred and fifty thousand dollars (\$150,000).

IN WITNESS WHEREOF the parties hereto

have hereunto subscribed their names, and affixed their corporate seals, by their officers thereunto duly authorized, the day and year first above written.

STANDARD AMERICAN DREDGING
COMPANY,

[Seal]

By CLAUDE CUMMINS,
Vice-Prest.

By W. A. H. CONNOR,
Sec'ty.

RICHMOND DREDGING COMPANY,

[Seal]

By H. C. CUTTING,
Prest.

H. W. WERNSE,
Sec.

[Endorsed]: Agreement. Standard American Dredging Company with Richmond Dredging Company. Dated February, 1910.

No. 2208. U. S. Circuit Court of Appeals for the Ninth Circuit. Cummins Exhibit 4. Received Dec. 13, 1912. F. D. Monckton, Clerk.

Connor's Exhibit 1 in Surrebuttal.

THIS AGREEMENT, made and entered into this _____ day of February, 1910, by and between the STANDARD AMERICAN DREDGING COMPANY, a corporation, the party of the first part, and RICHMOND DREDGING COMPANY, a corporation, the party of the second part,

WITNESSETH:

WHEREAS, the party of the first part is the owner of the electric dredger "Oakland," and the

party of the second part is desirous of hiring said dredger to be used for filling on certain lands at and near Richmond, California, under a contract between the party of the second part and the Richmond Canal & Land Company; and others and,

WHEREAS, the party of the second part is the owner of the suction dredger called the "Richmond No. 1," now in the possession of the party of the first part under an agreement between the parties hereto, bearing date the 18th day of October, 1909, and the party of the first part is desirous of continuing the possession and use of said dredger "Richmond No. 1," as hereinafter provided:

IT IS HEREBY AGREED:

The party of the first part hereby lets and leases unto the party of the second part, and the party of the second part hereby hires and takes from the party of the first part, the said electric dredger "Oakland," to be used for the filling of the said lands, at and near Richmond, California, for the term of thirty (30) days from and after this date; and during the said term said dredger shall be so used by the party of the second part for not to exceed twelve (12) hours of each day.

In consideration for the use of said dredger for said period of thirty (30) days of 12 hours each day, the party of the first part shall have the use of the said dredger "Richmond No. 1" under its said agreement with the party of the second part, for the period of thirty (30) days, without the payment of any rent or charter money, the use of said dredger "Richmond No. 1" twenty-four (24) hours a day being

Standard American Dredging Company et al. 1065
compensated by the use of said dredger "Oakland" twelve (12) hours a day.

The party of the first part agrees to deliver said dredger "Oakland," with her equipment, at Point Richmond, on or before the — day of February, 1910.

From the time of the receipt of said dredger by the party of the second part until the return of said dredger to the party of the first part, at the expiration of the term of this agreement, (or any extension of said term), the party of the second part shall be responsible to the party of the first part for the said dredger in any event, and agrees to return said dredger to the party of the first part in as good order and condition as the same shall be at the beginning of the term of this agreement, reasonable wear and tear thereof, and damage by fire, only excepted.

The party of the second part also agrees that during the term of this agreement it will pay all charges for labor, electric current, supplies, repairs, and all other expenses of any kind and character whatsoever in and about the operation of the said dredger "Oakland," and also hold the said dredger "Oakland" and the party of the first part, harmless from any debts that accrue from any of the expenses aforesaid, or from any act or omission of the party of the second part.

Said party of the second part shall have no authority to incur any obligations whatsoever on the credit of said dredger "Oakland," or on the credit of the party of the first part. In the event that any claim of lien, or other claim or demand shall be as-

serted by any one whatsoever, against the said dredger "Oakland" or the party of the first part on account of any indebtedness or other liability incurred by the party of the second part, or arising out of any act or omission of the party of the second part, said party of the second part shall, and hereby agrees that it will, promptly pay and discharge the same, and will also pay to the party of the first part all costs, expenses, attorneys' fees that shall be incurred by the party of the first part on account thereof, and all damages that may be sustained by the party of the first part by reason thereof.

If at the expiration of the said term of thirty (30) days the party of the first part shall not have found any other work that it desires to do with said dredger "Oakland", this agreement may, at the option of the party of the second part, be extended for an additional period of thirty days, on the same terms hereinabove set forth.

If at any time during the term of this agreement, or the said extension of thirty (30) days, the party of the first part shall secure work which it desires to do by the use of said dredger "Oakland", it may, at its option, ^{at the end of any 30 day period} terminate this lease of the said dredger "Oakland"; provided that at the time of such termination the party of the first part shall ^{return said dredger} ~~take possession~~ ^{and equipment in condition to immediately start work but at least} ~~of and assume the charge of the operation of said dredger~~ "Oakland", working twenty-four (24) hours a day, in performing such amount of filling as may be desired by the party of the second part on the lands aforesaid, not exceeding a total of 400,000 cubic yards of material, including the filling that shall theretofore have been done by the use of said dredger "Oakland", under this agreement. During all of the time that said dredger shall be operated by the party of the first part in making said fill, the party of the second part shall, and hereby agrees that it will, pay to the party of the first part the actual cost of

25 deep water of such dimensions of this lease shall be given the party of the 2nd part to keep the party of the 1st part

1000 Richmond Dredging Company vs.
operation of said dredger "Oakland", plus a rental at the rate of sixteen hundred dollars (\$1600) a month, such payment to be made as follows:

(a) On or before the 15th day of each month, the party of the second part shall pay to the party of the first part, in cash, one-half of the cost of operating said dredger "Oakland" during the last preceding calendar month.

(b) At the time of taking charge of the operation of the dredger "Oakland", as hereinbefore provided, the party of the first part shall fix a limit of time, that it will keep said dredger "Richmond No. 1" at a rental of eight hundred dollars (\$800.), a month, and the remaining one-half of the operating expenses of the dredger "Oakland", and the said rental of sixteen hundred dollars (\$1600.) a month for said last named dredger shall be off-set by the rental of the dredger "Richmond No. 1" for the period so designated by the party of the first part, as far as such last named rental will go in diminution of such rental of the dredger "Oakland" and the cost of operating the same.

(c) The remainder of the said operating expenses of the dredger "Oakland" and the rental therefor, at the rate of sixteen hundred dollars (\$1600) a month, after applying the rental of the dredger "Richmond No. 1" in diminution thereof, shall be paid to the party of the first part, at the completion of the work by the "Oakland", as follows: either all in cash; or, at the option of the party of the second part, by the conveyance to the party of the first part of the tract of land hereinafter described, at an agreed valuation of six thousand dollars (\$6000.), and the balance in cash; said tract of land being described as follows:

Standard American Dredging Company et al. 1888

If, after deducting one-half of the operating expenses of the "Oakland" paid in cash from month to month as hereinbefore provided, and offsetting the rent of the "Richmond No. 1" for the term of her use by the party of the first part, the balance due the party of the first part shall not equal six thousand dollars (\$6000.), the said balance shall be paid to the party of the first part, either in cash, or at the option of the party of the second part by the conveyance of such part of the tract of land aforesaid as shall be selected by the party of the first part, as will represent the amount of such balance at the rate of \$ _____ an acre, which shall include all improvements that shall be on said land at the time of selection and conveyance.

Any conveyance of land to the party of the first part, made in pursuance of this agreement, shall convey such land by good, sufficient and merchantable title, free and clear of all incumbrance.

In consideration of the execution of this agreement, all claim of the party of the second part to increased rental, or other charge, by reason of the detention of the "Richmond No. 1" beyond the term of the said charter, is hereby waived; and the term of said charter, as modified by this agreement, is hereby extended, for the term of sixty days from this date, and for such further time as shall be ^{agreed upon} ~~fixed and determined by~~ the party of the first part if it shall take charge of the operations of the dredger "Oakland" as herein provided.

being

The performance of all of the covenants, terms and conditions of this agreement on the part of the party of the second part to be performed, shall be guaranteed by the Richmond Canal & Land Company, and shall also be secured by a chattel mortgage on the said dredger "Richmond No. 1", and if, at the end of the term of the charter of said last named dredger, the party of second part shall not have performed all of the covenants, terms and conditions of this agreement, on its part to be performed, the party of the first part may retain possession of said dredger "Richmond No. 1", until such full performance shall have been made, without liability to the party of the second part for such detention, or for the safety of said dredger beyond the exercise of ordinary care.

It is agreed that the value of the said dredger "Oakland" is the sum of \$ _____.

IN WITNESS WHEREOF, the parties hereto have hereunto subscribed their names, and affixed their corporate seals, by their officers thereunto duly authorized, the day and year first above written.

STANDARD AMERICAN DREDGING COMPANY.

By _____

By _____

RICHMOND DREDGING COMPANY

By _____

By _____

[Endorsed]: First draft. Agreement. Standard American Dredging Company with Richmond Dredging Company. Dated February, 1910.

Case No. 2208. U. S. Circuit Court of Appeals for the Ninth Circuit. Connor's Exhibit 1 in Sur-rebuttal. Received Dec. 13, 1912. F. D. Monckton, Clerk.

No. 2208.

IN THE

United States Circuit Court of Appeals

FOR THE NINTH CIRCUIT

RICHMOND DREDGING COMPANY
(a corporation),

Libellant and Appellant,

vs.

Dredger "RICHMOND NO. 1" and
STANDARD AMERICAN DREDG-
ING COMPANY (a corporation) *et al.*,
Claimants, Defendants and Appellees.

APPELLANT'S BRIEF

STATEMENT OF THE CASE.

In this case libellant and appellant being the owner of a certain hydraulic dredge, fitted with gasoline engines, filed a libel in the U. S. District Court for the Northern District of California, on Sept. 2, 1910, under Rule 20 of the Rules of Practice promulgated by the United States Supreme Court in Admiralty, claiming possession of the said dredge, her machinery, etc. A monition and citation issued on that day, and the Marshal seized the said dredgs thereunder; the cita-

tion was served by the Marshal on the Standard American Dredging Company, a defendant, on the same day. (Pp. 4-8 of Transcript.)

Sept. 7th, 1910, the Standard American Dredging Co. claimed the dredge. October 7th, 1910, California Reclamation Company, a corporation (an appellee) claimed a certain gas engine on the dredge. On the same day Atlas Gas Engine Company (an appellee) claimed another gas engine on the dredge.

On September 12th, 1910, the Standard American Dredging Company made a motion to have possession of the dredge then in possession of the Marshal restored to it. The motion was based upon a notice of motion and an affidavit. (Pp. 13-17.)

There is no claim in the affidavit that the Standard American Dredging Company *owned the dredge*, but it does appear that they claimed possession under a charter party, and it desired to use it in taking material from the bed of the Sacramento River at Walnut Grove, Sacramento County, Cal., under a contract between the said Standard Co. and the Southern Pacific Co., stating further, among other things, that it would be unable to complete its contract if it was not permitted to use the dredge during the pendency of the action. (Pp. 15-17.)

The motion was heard Sep. 13, and an order was made to the effect that the vessel might be released upon the giving of *an admiralty stipulation*, in the sum of forty thousand dollars. (Folios 17-18.)

On the same day a bond was given in that amount to the Marshal (pp. 18-20) by the Standard Ameri-

can Dredging Company *as principal*, the condition thereof being (Page 19) :

“Now, therefore, the condition of this obligation is such that if the above-bounden Standard American Dredging Company, claimant of said Dredger, shall answer, abide by and perform the decree of this Court, *and return the said dredger in the same condition in which it now is and in good repair*, and shall pay all damages which may be sustained by reason of the detention of said dredger, then this obligation shall be void; otherwise, the same shall be and remain in full force and virtue.”

Sept. 14, the stipulation was approved by his Honor the late Judge De Haven, as follows (Page 20) :

“The within and foregoing *admiralty stipulation* is hereby approved as to form, amount and sufficiency.”

The claim of the said Standard Co. reads in part (Page 21) :

“and makes claim to the said dredger, her engines, boilers, machinery and equipment. * * *”

The return of the Marshal (Folios 7-8) shows as follows:

“that said property remained in my custody and in charge of said keeper up to and including the 14th day of September, 1910, when the Standard American Dredging Company claimed said Dredger Richmond No. 1 and entered into and executed an Admiralty Stipulation in the sum of

Forty Thousand Dollars (\$40,000.00), whereupon I immediately released said dredger from my custody."

Oct. 7th, 23 days after the release of the property to the said Standard Co., the Atlas Gas Engine Company filed a claim reading in part as follows (Page 22) :

"The Claim of the Atlas Gas Engine Co., a corporation, to that certain 4 cylinder Atlas Gas engine of 12-inch bore 12-inch stroke, with complete equipment, now in the custody of the marshal of the United States for the said Northern District of California, at the suit of the Richmond Dredging Co. * * *"

On the same day the California Reclamation Co. filed a claim reading in part (Page 23) :

"The claim of California Reclamation Co., a corporation, to that certain 4 cylinder 150 horsepower marine gas engine belonging to and being a part of the equipment of the launch 'Wink,' now in the custody of the Marshal of the United States for the said Northern District of California, at the suit of the Dredging Co., a corporation. *
* *"

May 9th, 1911, libellant filed a second amended libel upon which issue was taken and the case tried, and also a supplemental libel containing four distinct claims of damage and having four exhibits attached.

This pleading is to be found on pages 24-59.

The second amended libel sets up ownership and

right of possession of the said dredge "Richmond No. 1," her engines, boilers, machinery and equipment. (Pp. 25-26.)

"That said dredger 'Richmond No. 1' is a vessel consisting of a hull and superstructure, containing a galley and cabin for her crew, also her machinery necessary for and usual in an hydraulic dredger; that the said dredger 'Richmond No. 1' is built to operate afloat and not otherwise, and during all the times herein mentioned has been and now is operated afloat and is equipped to navigate upon the ocean and other navigable waters."

The date of the ownership and right of possession of the said dredger, her machinery, etc., is fixed as August 15th, 1910. (P. 26.)

The answer of the Standard American Dredging Company first admits ownership by the libellant of the dredger "Richmond No. 1," *her engines, boilers, machinery and equipment at the time mentioned in the libel*, then denies that the engines upon the dredger at the time of the filing of the original libel were the property of the libellant. (P. 72.) It also admits the vessel had a superstructure, etc., and that she was so constructed that she floats on the water and operated afloat, etc.; alleges that she was not equipped to navigate the ocean, had neither masts nor spars, etc., and other matters claiming right of possession, etc. The answer was filed by the said Standard Company August 1, 1911. (P. 92.)

The answer admitted it owed the libellant \$8600.00.

but claimed offsets for the wages of a keeper upon the dredge from February 3rd to August 1st, 1911.

November 24th, 1911, the Standard Company moved for leave to file a supplemental answer, which was granted on the same day. In that answer the Standard American Dredging Company alleged that on the 1st day of August, 1911, it commenced an action in the United States Circuit Court for the Northern District of California against the Richmond Dredging Company and caused the dredger Richmond No. 1 to be attached by the Marshal and has paid \$590.00 for keepers' fees, and prayed that that amount be credited on the said \$8600.00 if the Court should determine that it had jurisdiction. (Pp. 68-70.)

The Atlas Gas Engine Company also filed an answer, claiming that it owned a certain 12-inch diameter cylinder, 12-inch stroke cylinder stationary gas engine, on board of the Richmond No. 1 at the time she was attached by the Marshal. (Pp. 91-93.)

California Reclamation Company filed an answer alleging that it owned a certain Atlas marine engine of 150 horsepower with four cylinders and of 12-inch stroke with bronze propeller and other full equipment, which, upon the 2nd day of September, 1910, were upon the dredger Richmond No. 1 when said dredger was attached by the Marshal. (Pp. 94-97.)

In the supplemental libel libellant alleged several matters, the first claim of damage being a claim for damages for detention of the dredge, from the date of its delivery by the Marshal under the admiralty stipulation hereinbefore mentioned and for \$600.00 which the Standard Company paid to the Marshal for

the use of the dredge from the time she was seized up to that date. It sets forth the seizure, the application for release; that it resisted the said application, the conditions of the admiralty stipulation and claimed damages at the rate of \$50.00 per day from the 2nd day of September, 1910, to the date of filing the supplemental libel March 9th, 1911, in all \$9,400.00 (Pp. 32-36.)

Exceptions were filed to the second amended libel and also to the supplemental libel, and overruled as to the libel itself and the first and third claims of damage in the said supplementnal libel and sustained as to the *second* and *fourth* claims of damage. (Pp. 66-67.)

The second claim of damage in the supplemental libel is to the effect that on or about April 25th, 1910, the Richmond Dredging Company entered into a contract in writing to do certain street work at the City of Richmond, in the State of California, and executed a bond to do that work; that the Standard Dredging Company knew of that contract and knew the libellant would need the dredger "Richmond No. 1" or the dredger Oakland to do the work; that it commenced the work with the said dredger "Oakland" and continued to do it up to the 15th day of August, 1910, when the charter party of the "Oakland" was terminated by the said Standard Company and its dredger returned to it by the Richmond Dredging Company; that at that time it had done work of the value of \$10,000.00, which it was forced to relinquish its claim for against the City of Richmond on account of its inability to proceed with the work because of having

no dredge to do it with, to save it and its surety from damages for the failure to do the work within the time required. (Pp. 36-42.)

(At this point we call the Court's attention to the fact that the Court found that libellant was entitled to the possession of its dredger "Richmond No. 1" *on the 2nd day of September, 1910.*) (Pp. 1005-1009.)

And that the Standard American Dredging Company knew that to be the fact, and made application for the possession of that dredge under the admiralty stipulation falsely and fraudulently and prayed damage in the sum of \$10,000.00. (Pp. 37-42.)

The fourth claim of damage alleges that the Standard Company, with the wrongful intent, etc., to deprive libellant of the use of its dredge and cause libellant great loss and damage, detained the said dredge from libellant and prayed damage in the sum of \$5000.00. (Pp. 44-45.)

The third claim of damage is that when the dredger "Richmond No. 1" was released by the Marshal on the order of Court upon the admiralty stipulation hereinbefore mentioned, it had on board as part of her complete machinery and equipment two certain gas engines known and described as follows: A certain four cylinder 150 horsepower marine gas engine, a certain four cylinder Atlas gas engine, 12-inch bore and 12-inch stroke.

That although the said engines were aboard of and in use by and formed an integral part of the said dredger Richmond No. 1 when she was released by the Court into the possession of Standard Company on

the 14th day of September, 1910, and the title and ownership admitted to be in the libellant, still, while the said dredger was in possession of the said Standard Company, under the order of the Court as aforesaid. the said Standard Company removed or caused the engines to be removed without the consent of and against the will of the libellant, or the Court, or of the United States Marshal, etc.; that said engines were of the value of \$10,000.00 and demanded damages in that sum. (Pp. 42-43.)

The answer of the Standard Company (pp. 88-89) admits that the Standard Company removed the said engines without informing the Court and does not deny that it was done without the consent or will of the libellant.

Attached to the second amended libel are exhibits A, B, C and D, the execution whereof are admitted and collectively they contain the agreements between the libellant and the Standard American Dredging Company relating to the dredger "Richmond No. 1" and the dredger "Oakland."

Exhibit A commences at page 46 and is dated the day of February, 1910 (the date February 26. appears in the evidence), it recites that the Standard American Dredging Company was the owner of the electric dredger Oakland.

That the Richmond Dredging Company was the owner of the suction dredger "Richmond No. 1" then in possession of the Standard American Dredging Company under a charter between those parties dated the 18th day of October, 1909, and the Standard Company

was desirous of continuing in the use of that dredge as hereinafter provided.

Then the Standard Company agrees to lease the "Oakland" to the libellant, and it agreed to take that dredge at the rental of \$800.00 per month for a twelve-hour shift and \$1600.00 per month for a twenty-four-hour shift for the term of sixty days, the dredge to be delivered on or before February 26th, 1910, and from the time of its delivery until its return at the expiration of such agreement (or any extension of said term) libellant should be responsible for the dredge, etc.

The first part of the agreement is to the effect that libellant had work to do at the City of Richmond; then that it was the owner of the "Richmond No. 1" and the Standard Company desired to retain possession of that dredge which it then had.

It is clear that the libellant having work to do at the City of Richmond desired its dredge to do it, and that the Standard people finding it had work to do that the "Richmond No. 1" could best do, desired to retain that dredge, and the "Oakland" being suitable for the libellant's work it turned that dredge over as a substitute, so that it could retain libellant's "Richmond No. 1."

Paragraph 7 of the agreement reads as follows:

"7. In consideration of the execution of this agreement, all claim of the party of the second part to increased rental, or other charge, by reason of the detention of the 'Richmond No. 1' *beyond the term of the said charter*, is hereby waived; and the term of said charter, as modi-

fied by this agreement, is hereby extended, at the rental of eight hundred dollars a month, for the term of sixty days from this date, and for such further time as shall be fixed and determined as hereinafter provided; and the rental of said dredger 'Richmond No. 1' to be earned, shall be applied as an offset to the rental of the dredger 'Oakland' as far as it will go."

It thus appears that the previous charter of the "Richmond No. 1" was extended to suit the convenience of the Standard Company.

It then provides that if at the expiration of the said sixty days the Standard Company had not found any work to do with the said "Oakland" and the libellant had not filled in 400,000 yards the time could be extended at the option of the libellant (second party), or until the party of the first part should have given the party of the second part fifteen days' notice of termination of the agreement (fol. 49) or require it to work the dredge twenty-four hours per day until 400,000 yards had been filled in by said dredger, including what had already been done.

In the event that the lease was terminated we find the conditions under which it could be done to be as follows (fols. 49-50):

"or to terminate this lease of the said dredger 'Oakland' by giving the party of the second part (15) days notice of such termination, *and returning the dredger 'Richmond No. 1'* to the party of the second part as in said charter provided, or paying the party of the second part at the rate of fifty (50) dollars a day for the said 'Richmond

No. 1' for all time it shall be retained by the party of the first part after the expiration of said fifteen (15) days notice, and the return of the 'Oakland' to the party of the first part."

Paragraph 10 (p. 50) reads:

"It is hereby mutually agreed and understood that the rent of said dredger 'Richmond No. 1' shall be eight hundred (800) dollars per month, and that the said first party shall have the right to lease and use said dredger 'Richmond No. 1' *at any and all periods when not in use or required by the party of the second part until Jan. 1st, 1911.*"

The contract of February 10th, 1909, is found at folios 51 to 54 and is to the effect that the Standard Company desired to use the "Richmond No. 1" at Lake Merritt, etc. It was agreed that it could take it from San Rafael Creek, where it then was, to said Lake Merritt for the period of at least four months; that all pipe used at said Lake Merritt was to be the property of the libellant and that (fol. 54) rent was to commence as soon as dredge is delivered in Lake Merritt, or in any event not later than February 28th, 1909, and the party of the second part agrees to work a full crew day and night to move said dredge into Lake Merritt as speedily as possible, and rent to cease as soon as dredging is completed in said lake; dredge to be removed from Lake Merritt immediately upon completion of said dredging and delivered at Richmond within two weeks thereafter, otherwise rent will be charged therefor.

October 18th, 1909, the parties entered into another agreement, "Exhibit C," under which the Standard Company leased the said dredge 'Richmond No. 1' to do work at Lake Merritt at a certain stipulated rent and it agreed to (p. 56):

"Said second party further agrees to deliver dredge pipe and all equipment, to and in the Canal at Richmond by the 31st day of January, 1910, otherwise rent will be charged therefor at the rate of Fifty (\$50.00) dollars per day."

The foregoing language in the contract of February 25th, 1910, the last contract

"and that the said first party shall have the right to lease and use said dredger 'Richmond No. 1' at any and all periods when not in use or required by the party of the second part until January 1st, 1911."

Together with the condition that it must return the said dredger "Richmond No. 1" to the party of the second part at any time it gave the 15 days' notice, shows conclusively that if it ever demanded the "Oakland" it had to return the "Richmond No. 1."

August 15th, 1910, the Standard American Dredging Company demanded possession of the "Oakland" and the Richmond Dredging Company, acting in good faith, and within the terms of its contracts in that behalf, returned the dredge, although its work at the City of Richmond was unfinished, it never dreaming it would not receive its own dredge back, with which it could do the said work. Libellant demanded its dredge when it returned the "Oakland" and made re-

peated demands, and on the 1st day of September, 1910, it sent a letter to the Standard Company, of which the following is a copy (Exhibit "D") attached to the second amended libel (p. 57):

"To the STANDARD AMERICAN DREDGING COMPANY,

"San Francisco, Cal.

"Richmond Dredging Company hereby again makes further and repeated demand for the immediate return to it of the dredger 'Richmond No. 1.'

"Demand was made upon Standard American Dredging Company on the 15th, and on the 16th, of August, 1910, for the immediate return to Richmond Dredging Company of the dredger 'Richmond No. 1,' but the said dredger has not been returned.

"As you have already been notified, Richmond Dredging Company has use for and now requires the dredger 'Richmond No. 1,' and said Richmond Dredging Company has heretofore terminated, and now hereby terminates the lease or agreement under which you took and now hold possession of said dredger 'Richmond No. 1,' and again demands the immediate return of said dredger.

"You will further take notice that Richmond Dredging Company will claim fifty (\$50.00) dollars per day for the use of said dredger 'Richmond No. 1' for every day that it is entitled to claim that amount under the agreement by virtue of which you hold said dredger or otherwise.

"It is suggested that a representative of Standard American Dredging Company meet a representative of Richmond Dredging Company with-

out delay for the purpose of adjusting the accounts between said companies.

"Dated at San Francisco this 1st day of September, 1910.

"(Signed) RICHMOND DREDGING COMPANY.

"By (Signed) H. C. CUTTING."

Upon the refusal of the Standard Company to return the "Richmond No. 1" to it it filed the libel herein.

After the receipt of the said dredge from the Marshal under the admiralty stipulation hereinbefore mentioned the Standard Company kept possession of and operated the dredge, finishing up its contract with the Southern Pacific Company, but it left libellant without any dredge to finish its contract with the City of Richmond. The "Richmond No. 1" was built September, 1907. Libellant operated it altogether about eight months. The Standard Company had it about two years and four months, during which time it did work with it in Lake Merritt, in Alameda County, and at San Rafael. It towed it out to sea and up to Eureka, Humboldt County, and back upon its return it was taken to Alameda, and at that place the engines that were on the dredge when the Standard Company received it and which had been placed there when it was built, were taken off and one of the Atlas engines in controversy in this case installed in its place. When that job was finished it was towed up to Walnut Grove and another Atlas engine installed. Those engines were on the dredge at the time the dredge was seized

by the Marshal and when he surrendered the dredge to the Standard people the Samson engines that the Standard people took off had been sent by it to Point Richmond. When the Standard Company had finished its contract at Walnut Grove it towed the dredge back to San Francisco Bay and then took off the Atlas engines and put the Samson engines back on the dredge again, worn out, out of repair and useless as gas engines. The original change of engines was made without either the knowledge or consent of libellant, and the subsequent restoration of the Samson engines was also done without the consent of the libellant and against its objections. (Pp. 217-218.)

The Samson engines were examined by Mr. Musladin, an expert, on October 11th, 1910, about six weeks after the libel was filed herein. They were then lying in the shop of the Point Richmond Canal & Land Company, at Richmond, Cal., and in bad condition after an extended use thereof by the Standard Company. He testified (pp. 104-135) that at that time the crank shafts were cut and scored, two of the fly wheels were cracked, the valve gear had been exposed until there was nothing left of it. It would have to be entirely replaced. The cylinders needed reboring, and he gave as an estimate of what it would have cost to put the engines so that they would run as \$2246.00. (Pp. 131-132.)

The Standard Company subsequently put the engines back on the "Richmond No. 1," gave them a coat of paint and they produced testimony as to their condition. Their witnesses, largely consisting of a Mr. Harding, a Mr. Knight and some other who went over

to see the engines the day before they testified. At that time the dredge was in the custody of the United States Marshal, and he would not allow them to take any of the engines apart, so the only examination they could make was what they could observe by just looking at them. (Knight, witness for appellees, p. 436.)

"Q. Would you be able to tell whether or not they would operate at all from an inspection such as you made over there on Tuesday?

"A. No, sir.

"Q. You could not tell whether or not they would even start at all?

"A. No, sir."

This is not a case of conflict of testimony. It is a case where the witnesses for the libellant had made a careful examination, and the witnesses for the claimants had made no examination at all that made their testimony of any value.

February 3rd and 6th, 1911, the Standard Company tendered the dredge to the libellant. This was about five months after the filing of the libel and when libellant had been seriously damaged and five months after the date that the lower Court found the libellant was entitled to it, and at the time it was so tendered it was not in a condition to be operated, according to the testimony of Mr. Musladin, and claimant's witnesses state to the above effect. The engines that had been placed on the dredge, to-wit: the Atlas engines, when the Samson engines had been worn out by the Standard Company, had been removed and the worn out and worth-

ss Samson engines were placed upon the dredge. (Pp. 221, 226, 227, 231, 232.)

It is admitted that the Standard people wore out a pump and placed a new one on which they left there (p. 401) and it was proved that repairs on a dredge generally consisted of replacing the worn out article by a new one. (Pp. 159, 160, 162, 163, 164, 171, 173, 192, 293.)

Libellant refused to accept the dredge when tendered on account of its not being in the same condition as when received, *or as when the admiralty stipulation was given.*

It appears that Mr. Connor, the manager of the claimant, admitted that the Samson engines were worthless. (P. 231.)

The lower Court found that libellant was entitled to the possession of the dredge August 16th, 1910, and gave judgment for its possession and \$50.00 per day from that date to the date when it was tendered, finding that libellant was compelled to take it when so tendered, and libellant appealed.

The points involved on this appeal are: ,

a. Is this a case of admiralty jurisdiction?
 a 1. Did the Standard American Dredging Company hold the dredge "Richmond No. 1" under the terms of the several charter parties, when it received it from the United States Marshal under the admiralty stipulation?

b. Should the lower Court have sustained the exceptions to the second and fourth claim of damage in the supplemental libel?

c. What was the effect of the admiralty stipulation as to claimant's right to remove machinery that was an integral part of the dredge?

d. Had claimant the right to remove the Atlas engines from the dredge at all?

e. Was not the libellant entitled to the sum of \$50.00 per day for the use of the dredge for the period up to and including the 1st day of August, 1911, instead of the limited period for which the Court awarded it?

f. Was not the libellant justified in refusing to take the dredge in the condition it was in when tendered?

I.

THIS IS A CASE OF ADMIRALTY JURISDICTION.

This dredger floated upon the water, it had accommodations for and carried a crew of 16 men (pp. 149, 914-915); it was on one occasion towed out on the ocean to Eureka, Humboldt County, California. It was towed from place to place around the Bay of San Francisco and the waters tributary thereto. Of necessity when engaged in filling in it was also deepening the waters where it operated and made them better fitted for the navigation of vessels, and we have abundant authority that this is a case of admiralty jurisdiction.

The case of *Aitcheson et al. vs. The Endless Chain Dredge et al.*, decided by the District Court E. D. Virginia, October 17th, 1889, and reported in 40 F. R. p. 253, at page 254 holds that:

"1. As to the question whether a steam dredge which is a floating scow fitted with steam appli-

ances, buckets and scoup for deepening channels of navigation and like purposes, is a subject of admiralty jurisdiction, there have been repeated decisions in the United States and Great Britain in the affirmative. (See *The Hezekiah Baldwin*, 8 Ben. 556; *The Alabama*, 19 Fed. Rep. 544; affirmed on appeal, 22 Fed. Rep. 449; *The Pioneer*, 30 Fed. Rep. 206; *Woodruff vs. A Scow*, *Id.* 269, and the *Mae*, L. R. 7 Prob. Div. 126. This court has also held likewise, incidentally, in *Maltby vs. A Steam Derrick*, 3 Hughes, 477, and *Coasting Co. vs. The Commodore*, *post*, 258, (which was a dredge case, decided by me at Norfolk)."

The above rule applies to a dredge in its home port. (*The Atlantic*, 53 Fed. Rep. 607.)

In the case of *McRae vs. Bowers Dredging Co.*, reported in the 86 Fed. Rep. 344, it was held that a dredge designed to facilitate navigation, to be used in deepening harbors and channels and removing obstructions from navigable rivers, and to bear afloat heavy machinery for that class of work, are subject to a maritime lien, and on page 347 the Court, among other things, states:

"The width of a stream or length of a voyage is no criterion by which to determine the character of the service, nor the question of admiralty jurisdiction. Neither will jurisdiction of a floating structure be denied by a court of admiralty because it does not carry masts, propelling machinery, or steering apparatus, or lacks accommodations for a crew. There is great confusion in the decisions as to whether particular structures, such as pile drivers, wharf boats, rafts and dismantled

vessels are to be classed within or without the pale of admiralty jurisdiction. The following is a list of cases in which the jurisdiction has been sustained over a great variety of floating structures, including a floating elevator, a harbor tugboat of less than five tons, a scow, a canal boat used only upon an artificial canal wholly within one state, a barge without masts, sails, propelling machinery, rudder or anchor, a ferry boat, a steam derrick boat, a floating boathouse, a pile driver, a dredger and a raft of timber. (The Court then cites more than forty cases in support of jurisdiction.)”

The case of *Bowers Hydraulic Dredging Co. v. Federal Contracting Co.*, 148 Fed. Rep. 290, was an action in admiralty to recover the hire of a dredge under a written contract, and the Court held it was a suit for admiralty jurisdiction and cited many authorities and took occasion to refer to the case of *The Blackheath*, decided by the Supreme Court of the United States, 195 U. S. 361, to which we call your attention especially and which to our minds settles the question in favor of jurisdiction in the case at bar.

II.

THE STANDARD AMERICAN DREDGING COMPANY DID NOT HOLD THE “RICHMOND NO. 1” UNDER THE TERMS OF ANY CHARTER PARTY OR AGREEMENT BETWEEN IT AND LIBELLANT WHEN IT TOOK THAT DREDGE FROM THE MARSHAL.

The charter party of February 26th, 1910, reads in part as follows on page 46:

"Whereas, the party of the first part is the owner of the electric dredger 'Oakland,' and the party of the second part is desirous of hiring said dredger to be used for filling certain lands at and near Richmond, California, under contract between the party of the second part and the Richmond Canal & Land Company and others."

That shows knowledge on the part of the Standard Company of the libellant having work to do when the charter party was made.

It is also clear that it knew the work was not finished when it demanded and received the "Oakland."

It received a notice (pp. 57-58) and the Court found as follows (p. 1004):

"On August 16th, 1910, in compliance with the above notice libellant returned the 'Oakland' to the defendant dredger company, and at the same time demanded from the defendant company the immediate return of the 'Richmond No. 1,' and on September 1, 1910, demand was again made by the libellant upon the Standard Dredging Company for the return of the 'Richmond No. 1' the notice stated.

"As you have already been notified the Richmond Dredging Company has use for and now requires the dredger 'Richmond No. 1' and said Richmond Dredging Company has heretofore terminated, and now hereby terminates the lease or agreement under which you took and now hold possession of said dredger 'Richmond No. 1,' and again demands the immediate return of said dredger."

There is no dispute that the libellant had not finished its City of Richmond Contract, so the following language of the February 26th charter party immediately came into operation, to wit:

"and the said first party shall have the right to lease and use said dredger 'Richmond No. 1' at any and all periods when *not in use or required* by the party of the second part until January 1st, 1911."

Libellant having use for its dredger had the right to terminate the lease of the Richmond, and the Court so found (p. 1005).

1. The action was not prematurely brought. The agreement of February 25th, 1910, is certainly not a model of clearness, but I do not think it should be construed as giving to the Standard American Dredging Company the right to retain the possession of the "Richmond No. 1" against the will of the libellant after the lease of the "Oakland" had been terminated and that dredger returned to the defendant dredging company.

There was thus a termination of the hiring.

Civil Code, sec. 1933.

"The hiring of a thing terminates:

"1. At the end of the term agreed upon."

Section 1958:

"At the expiration of the term for which personal property is hired, the hirer must return to the letter at the place contemplated by the parties at the time of hiring; or, if no particular place

was so contemplated by them, at the place at which it was at that time."

The fact that it wrongfully retained possession of the property would not carry any of the terms of the agreements between them with such wrongful retention.

Skaggs vs. Edwards, 45 Cal. 154;

Canning v. Fibush, 77 *Id.* 196.

The case seems to have been tried and decided upon the theory that the holding of the property by the Standard Company, after August 16th, 1910, and under the admiralty stipulation, was under the terms of the several charter parties. That theory is clearly incorrect, as all charter parties had been cancelled. There was no contractual relation existing between the parties after August 16th, 1910, and the only relation that existed between the Standard Company and the dredge after the filing of the libel was one of sufferance by the United States Marshal to September 14th, 1910, and thereafter under the terms of the admiralty stipulation and the order upon which it was based as follows (p. 18) (order): "conditioned for the return of " said dredge to the owners thereof in as good condition *as it now is* and for all damages which may have " been sustained by reason of its detention."

The stipulation is in conformity with the order, and the tenancy or holding of the Standard Company, after the receipt of the dredge on the stipulation *is to be measured* by the order and stipulation and nothing else, and under it the Standard Company was bound to return the dredge *as it then was*, and *pay all damages* by

reason of the detention and of necessity it would have to pay in addition thereto the value of the reasonable use of the dredge, the benefit of which it would have.

III.

THE LOWER COURT ERRED IN SUSTAINING THE EXCEPTIONS TO CLAIMS OF DAMAGE II AND IV IN THE SUPPLEMENTAL LIBEL.

There can be no mistake about the meaning of the charter parties. They are so worded that if the Standard Company demanded the return of the "Oakland" they had to return the Richmond. The following language is clear on that point:

"or to terminate this lease of the said dredger 'Oakland,' by giving the party of the second part (15) days notice of such termination, and returning the dredger 'Richmond No. 1,' to the party of the second part as in said charter party provided.

"10. It is hereby mutually agreed and understood that the rent of said dredger 'Richmond No. 1' shall be eight hundred (800) dollars per month, and that the said first party shall have the right to lease and use the said dredger 'Richmond No. 1' at any and all periods *when not in use or required by the party of the second part until Jan. 1st, 1911.*"

Connor, the Standard Company's Superintendent, testified (p. 668) that when he served the 15 days' notice demanding the return of the "Oakland" on Mr. Cutting, the President of the libellant, Cutting said:

"We will have to have our dredge back."

The same witness testified (p. 672), in reply to a question as to the position of the libellant with respect to the City of Richmond dredging contract:

“A. They would have to get another dredge to do the work with, that is sure.”

It appears at length in other parts of the transcript that the work was being done at the City of Richmond by the libellant, and that the Standard Company knew all about it, so the libellant was clearly within all the terms of the charter party, the Standard Company, was required to return the dredge as a condition upon which its right to the “Oakland” depended, and the libellant under section 10 had a right to demand the return of its dredge when it required it, and the Standard Company had no right to the use of the dredge under those conditions.

But knowing that libellant needed the dredge, and had work to do, it obtained possession of its dredger “Oakland,” without any intent on its part to return the “Richmond No. 1,” and thus prevent libellant from performing its City of Richmond contract, its action in so doing was fraudulent, oppressive and deceitful, and the law applicable to actions in replevin is to the effect that where property is retained without any right whatever, damages to business can be recovered.

But the Standard Company stipulated in addition as follows in the admiralty stipulation:

“and shall pay *all damages* which may be sustained by reason of the detention of said dredger.”

There is no difference between this case and an action of replevin in a case where a plaintiff commences an action, files a bond and it is subsequently determined that he had no right to the property he must pay damages, and the same rule applies where a defendant files a bond and obtains a delivery of the property to him, and it is found that plaintiff had at all times been entitled to the possession as in this case.

The measure of damages in such case is actual damage, not rent of the property. Rental will not in all cases compensate a party. The rule is as follows:

Stevens vs. Tuite, 104 Mass. 328, 334.

"It is evident that the mere restoration of the property, or its equivalent in money, would fall short, and in many cases very far short, of being an indemnity for the wrong done to the defendant by interruption of his possession. Where that wrong consists merely in the detention of property, without waste or depreciation, or in the compulsory postponement of the exercise of his rights under legal process, the interest upon the value may be an adequate measure of the damages. * * *

Gen. Sts., c. 143, sec. 14. But the wrong to the original defendant (and present plaintiff) was more than the mere detention of the property and interruption of its use. It was more injurious to him than if he had been simply locked out of his place of business during the pendency of the suit. His complaint is, that his cloth printing establishment was wrongfully broken up; his steam-engine, machinery, fixtures and apparatus taken down and carried away; and that returning the property or its equivalent in money will leave him subject to

the great expense, inconvenience and delay of the entire reconstruction of his works. It is manifest that the damages actually awarded him do not cover all the elements of damage which he was entitled to prove, and might have proved; and the amount allowed him was for that reason inadequate as an indemnity for the wrong that he had sustained. * * *

"*The time to prove his damages*, and to have them assessed, in order to be included in the judgment, was when the replevin suit was before the court and on trial. * * *

"In contemplation of law, his claim for compensation (independently of the return of the goods, or their equivalent in money, as secured by the bond) would be made up of, 1st, interest on the money value; 2nd, *the general inconvenience and loss resulting from the interruption of his possession*; and 3rd, the expense, trouble and delay attending the operation of replacing everything and restoring the establishment to its original condition. This is an entire and indivisible claim, he cannot recover part of it in one action, and subsequently maintain another action for the remainder."

White vs. Mosely, 8 Pick. 356;

Chapman vs. Kirby, 49 Ill. 219;

Wells on Replevin, (2nd ed.), 572;

The Live Stock Gazette P. Co. vs. The Union Stockyard Co., 114 Cal. 447, 450;

Cal. Civil Code, secs. 3294, 3333;

Code Civ. Proc., (Cal.), secs. 627, 667.

The damages in this case should not have been limited to \$50.00 per day. Taking the charter parties as

a whole and all together, it is clear that the \$50.00 per day only had reference to the case of the detention of the dredger when it was permitted by the libellant, to-wit: in case where the Standard Company failed to return it when demanding its dredge "Oakland" and the provisions of section 10 of the charter party did not apply.

That amount will not compensate libellant in this case. It has no relation to the language in the admiralty stipulation that the Standard Company should pay *all damages* that might be sustained by the libellant. Damages are additional to the rent, and the admiralty stipulation was a new undertaking on the part of the Standard Company to pay damages of which rent was but one item.

The \$50.00 per day was for the mere use of the dredger. The Standard Company got full value for that in its use, the libellant lost the use of its property, and is compensated for the wrong sustained in the interruption of its business and the prevention of the performance of its contracts.

We submit that the second and fourth claims of damage were recoverable, and the Court erred in sustaining the exceptions.

IV.

EFFECT OF ADMIRALTY STIPULATION.

The language in the admiralty stipulation

"and return the said dredger in the same condition which it now is and in good repair"

means that when the Standard Company returned the dredge to the United States Marshal from which it received it, it should then be just as it was when the United States Marshal turned it over under the admiralty stipulation. It did not give the Standard Company the right to tear it to pieces or change its form.

The words abide by the decree have no further meaning than their import. The decree found that libellant was entitled to the dredge *at the time it was first seized*. "Abiding by the decree" could only mean that libellant was entitled to the dredge as it then was, not as it might be at a later date, after the Standard Company had seen fit to change its form and appurtenances. In all actions of replevin it has been universally held that a party who takes property under such a bond must return it just as he received it.

Washington Ice Co. vs. Webster, 125 U. S. 426. 439. "that the plaintiff is bound by his replevin bond to restore the goods as when taken. He is responsible, if judgment is against him, for the damaged or deteriorated condition of the goods when restored."

In *Douglas vs. Douglas*, 21 Wallace, 98, the bond stipulated for the return of the property and nothing more. The Supreme Court held that the bond was satisfied by its return, but said:

"If the defendant injured the property, or culpably suffered it to become injured while it was in his possession, a remedy must be sought in some other appropriate proceeding. It cannot be had in a suit on the bond."

Three States Lumber Co. vs. Blank, 133 Fed.
 479, 66 C. C. App. 353;
Briggs vs. Taylor, 84 Fed. 681, 28 C. C. App.
 518;
The Two Marys, 16 Fed. 697;
June vs. Payne, 107 Ind. 308;
Johnson vs. Mason, 70 N. J. L. 13;
Nichols vs. Pauson, 10 N. Dak. 440;
Fair vs. Citizens' Bank, 69 Kan. 353;
George vs. Hewlett, 70 Miss. 1;
McPherson vs. Acme Co., Id. 649.
Yelton vs. Slinkard, 85 Ind. 190;
Hinkson vs. Morrison, 47 Ia. 167;
Hezlett vs. Witherspoon, 25 So. 150;
Wells on Replevin, 2nd ed., sec. 422, and note
 on page 376.

Section 941, Revised Statutes, provides for special bonds as follows:

"If a special bond or stipulation in the particular cause shall be given under this section, the liability as to said cause on the general bond or stipulation shall cease."

This was a special bond. The general bond provided for in the section covers cases where a vessel is sued for debt to foreclose a lien and a bond for value is given, in which case the bond takes the place of the property.

A replevin bond is a forthcoming bond, and a mere bond for value will not be of any protection at all to an owner who has the right of possession and has been wrongfully dispossessed. A surety or a principal is bound by the terms of a stipulation he voluntarily signs.

Mink vs. Jackson, 66 Fed. 581, 573;
The Wanate, 95 U. S. 600-616.

Speaking of District Courts, says

“they have an undoubted right to deliver the property on bail and to enforce conformity to the terms of the bailment.”

The Madge, 31 Fed. 926;
United States vs. Ames, 99 U. S. 35.

It makes no difference in this case whether the Atlas engines belonged to the Standard Company or the Atlas Company or any one else. The Standard Company in this case went into Court, used the Court process and orders to obtain possession of property that it knew it had no right to, and having so used the process of the Court, it was its duty to return the property as it took it from the Court. If it had, or any one else had, any further rights in the premises it was its or their duty first to act in good faith with the Court, then seek relief on notice to the libellant so that it could have its day in Court on the right of the Standard Company if any gas engines that had been installed on the dredge. It is very difficult to find language adequate to convey a proper meaning to the actions of the Standard Company in this case, or to point to an adjudicated authority where a party before the Court and using its processes had the temerity to act as the Standard Company did in this case.

Libellant was entitled to the dredge as it was when the United States Marshal took it in the first place. It should have been returned to the Marshal and not to

the libellant, and we submit that there was a gross violation of the conditions of the admiralty stipulation that amounted to conversion of the Atlas gas engines, and libellant was entitled to damages for their value.

V.

THE STANDARD COMPANY HAD NO RIGHT TO REMOVE THE ATLAS ENGINES.

There is no question that the title to the Atlas engines passed to the owner of the "Richmond No. 1." When they were attached to that dredge they became fixtures.

There is no difference in principle between fixtures attached to personal property and those attached to real property. The same principles apply. Under section 1013 of the Civil Code of California the Atlas engines would have belonged to the owner of the land if it had been attached to the land and there is no recognized difference between land and personal property and the law of accession also applies to personal property.

Section 732, Civil Code:

"The owner of a thing owns all its products and accessories."

How the Atlas gas engines were attached is shown as follows:

(Testimony of W. J. Knight, p. 343.)

"A. I used them about a week; probably a little more while I was installing the 125 horsepower Atlas gas engine.

"Q. How did you install the 125 horsepower Atlas gas engine?

"A. Put it on the deck and just bolted it.

"Q. Did you remove—

"A. —just bolted it on to the deck; there were holes in the deck; that is all—three-quarter holes.

"Q. What was done with the Samson engines?

"A. We took them off and sent them over to the Richmond Dredging Company's warehouse or machine shop.

"Q. Will you tell us how the two Atlas engines were installed (p. 353) on the dredger?

"A. I had timbers from the base or foundation where the Samson engines stood built up level to the deck and the Atlas engines were installed on that.

"Q. Did you injure the hull of the dredger in any way?

"A. No, sir."

(P. 355.) "Q. After the Samson engines were reinstalled upon the dredger was anything done, if you know, to place the dredger in the same condition in which it was before, with reference to its hull and the deck?

"A. Yes, sir.

"Q. What?

"A. I had a carpenter working there.

"Q. What was done? Do you know?

"A. Placed everything back in the same condition as it was when I took charge of it *as nearly as we possibly could*.

"Q. What did he do, do you know?

"A. Put in new planks in the deck and plugged the holes that were made by the bolts, bolting the engines down and so forth.

"Q. Was it in a better or worse condition than it was before?

"A. In as good condition."

(P. 364.) "Mr. Taugher: Q. Did you get any permission from the Richmond Dredging Company to install that engine on the dredger?

"Mr. Lillick: I object to that as irrelevant.

"A. I did not. I don't know whether the company did.

"Mr. Taugher: Q. Where did you put that engine in?

"A. The forward end of the dredger.

"Q. How did you keep it in place?

"A. Bolted it to the deck."

(P. 375.) "Mr. Taugher: Q. Mr. Knight, it was rather a difficult and hard job installing those Atlas gas engines on that dredger, was it not?

"A. No, sir; not very.

"Q. What do you mean by 'not very'?

"A. Just a matter of taking the Samson engines out and putting timber for a base for the Atlas engines.

"Q. How were those timbers fixed to the boat?

"A. Put down to the foundation of the Samson engines.

"Q. Were those timbers bolted to the ship?

"A. A few bolts, yes.

"Q. Were they firmly affixed to the boat?

"A. Just by bolts.

"Q. What size bolts?

"A. I think one inch in diameter.

"Q. What length?

"A. They varied in length 2 feet up to 4 feet.

"Q. Those timbers were firmly affixed to the boat?

"A. Bolted to the boat.

"Q. It was quite a difficult job installing those Atlas gas engines, was it?

"A. No, sir; not very.

"Q. What do you mean by 'not very'?

"A. No difficult job when you had the material to do the thing with, and the Samson engines were out of the way.

"Q. How long did it take you to install the Atlas gas engines in the manner you have described?

"A. I could not remember.

"Q. About how long?

"A. I don't know.

"Q. Was it a day or a half or 2 or 3 days?

"A. It would probably be more than 2 or 3 days; several days we were getting ready; getting the timbers and putting them in. Do you refer to the first Samson engine or the first Atlas engine?

"Q. I have reference to the two Atlas engines that were installed in the place of the Samson engines which had been removed.

"A. We started in early and it was quite awhile before we got through with the Alameda job, after we were ready to put in the other Atlas engine. We could not take that until we got to Walnut Grove because we needed the launch 'Wink' to tow us up there.

"Q. That is all right, that part of it, but that is not what I want. I want to know how long after you got to Walnut Grove did it take to install those two Atlas gas engines and put them in place ready to run?

"A. Probably 24 hours.

"Q. 24 hours?

"A. But all the timber and everything else was put in place at Alameda with the exception of the engines.

"Q. How long did it take to put those timbers in place?

"A. Several days.

"Q. Several days?

"A. Yes, sir.

"Q. Several full days?

"A. Several days.

"Q. Several full days you were fixing those timbers to receive the Atlas gas engines?

"A. Yes, sir.

"Q. What do you mean by 'several', how many?

"A. I don't know.

"Q. Would it take a week?

"A. Probably it would; probably more.

"Q. How many men?

"A. Two men.

"Q. It took a week to get those timbers ready and shaped up to put in place?

"A. To take the Samson engines out and put the timbers in there it needed two men.

"Q. When did you take the Samson engines out?

"A. I don't remember the date. It was in the early part of the time we were working in Alameda.

"Q. While you were fixing those timbers and putting them in place to receive the Atlas gas engines substituted for the old Samson engines, where did you have the one Atlas gas engine that was installed during the early part of the Alameda job?

"A. On the deck between the Samson engines and the pump.

"Q. Did you build any foundation for that engine?

"A. Yes, sir; we put braces up between the keelson and the deck—shores.

"Q. For what purpose?

"A. So as to hold up the weight of the engine.

"Q. What did you put there?

"A. Braces—shores. The carpenter called them shores; timbers 6 by 6 or 12 by 12.

"Q. Those braces had no weight to carry after you installed the Atlas gas engines as they were doing the whole of the Walnut Grove job?

"A. No, sir. When I put the Atlas gas engines back where the Samson engines were I took those braces out."

(P. 451.) "Q. When you installed the two Atlas gas engines on the 'Richmond No. 1' at Eureka, did you do it in a workmanlike way?

"A. I did not install them at Eureka.

"Q. At Walnut Grove, I mean. Did you so install them that they would produce their greatest efficiency?

"A. Yes, sir.

"Q. Could you have made a better job of installing them if you tried?

"A. Yes, sir.

"Q. How?

"A. By putting in a better foundation or base for them, a cast-iron base instead of a timber arrangement.

"Q. How long would it take to get a cast-iron base made to put in there?

"A. It would take quite a long time. It would take an awful large pattern as we had to swing between those two engines a 56-inch pulley.

"Q. But so far as it could be done with timbers you did it as effectively as it could be done?

"A. Yes, sir."

That method of attachment made the engines a part of the dredge.

Section 1025 of the Civil Code reads:

"When things belonging to different owners have been united so as to form a single thing, and cannot be separated without injury, the whole belongs to the owner of the thing which forms the principal part; who must however reimburse the value of the residue to the other owner or surrender the whole to him."

Under that section the libellant had the right to the engines. If the facts were different he might have had to reimburse the Atlas Company or the Reclamation Company for their value, but it had no opportunity to do so in this case, as they were put on and taken off without its knowledge, a gross invasion of property rights. The dredge belonged to libellant. It was its property and no one had any right to change it in any way without its permission.

Section 1031, which is a statutory enactment of the common law, applies here, as follows:

"The foregoing sections of this article are not applicable to cases in which one willfully uses the materials of another without his consent; but, in such cases, the product belongs to the owner of the material, if its identity can be traced."

The Standard Company was a trespasser, it grossly violated property rights by taking the Samson Engines off, sending them to Point Richmond without any notification, and then getting them again without permis-

sion and reinstalling them, and the Atlas engines having been installed as a trespass, the whole product of the result of the trespass became the property of the owner of the principal thing.

There is a well recognized distinction between the cases of where a person admixes property under a claim of right and where he is a trespasser.

Guckenheimer vs. Angevin, 81 N. Y. 394.

397. "The case is analogous to that of a wilful trespasser, who has wrongfully converted a chattel and afterwards enhances its value by labor bestowed upon it. The wrongdoer in such a case is bound to account to the true owner for the value of the chattel in its changed or improved condition, and his recovery will not be limited to its value in the condition in which it was at the time of the conversion."

Hartford and N. H. R. Co. vs. Grant, 11 Fed. Cases, 699, 671.

A person who has acquired property has in so far as the welfare of the public is not concerned, absolute dominion over it, if its form and other matters connected with it suit him, no one else has any right to change it whether a lessee or not, if a person does change it in any way without the consent of the owner he is a trespasser, any interference with rights in personal property is a conversion, and the Standard Company was a trespasser when it took off the Samson engines and put on the Atlas. If the Samson engines were, according to its claim, of not sufficient power, it was its duty to return the dredge as not suited for its

purposes and get another that was. So the following conclusions follow. The Standard people were bound to repair this dredge, if, as is claimed by libellant, they put the Atlas engines on when they had worn the Samson engines so that they were beyond repair, or when it preferred to do so rather than make repairs on them, they of necessity became a part of the dredge as did the pump and the cables, etc.

If on the other hand they put them on because the power of the dredge was not satisfactory, then it was a trespasser in so doing and they equally belonged to the dredge, as the only right the Standard people had was to repair the dredge, not alter its form or appurtenances.

But in either case having put them on it was likewise a violation of the terms of the admiralty stipulation, an act of bad faith with the Court and a trespass to take them off again.

The engines became a part of the dredge.

The Edwin Post, 11 Fed. Rep. 602;
Porter vs. Pittsburg etc., 122 U. S. 267.

282. "Property affixed so as to become a part of a principal structure is subject to a lien of mortgage thereon although there is an agreement between the seller of the property and the purchaser that title shall not pass until they are paid for."

Evans vs. Kisler, 35 C. C. App., U. S. 37;
Phoenix Iron Works vs. N. Y. & T. Co., 28 Id.
 76.

Goods admixed as repairs become a part of the prin-

cipal thing. New sails were held to be part of a vessel in

Southworth vs. Isham, 3 Sand. 448.

The keel of a boat carries all that is attached with it.

Glover vs. Austin, 23 Mass. 209.

The principal thing always carries all that is attached.

Kelley vs. Border-City Mills, 126 Mass. 148;

Arnott et al. vs. Kansas Pac. R. R., 19 Kan. 95;

Cousin's Appeal, 79 Pa. St. 220;

Merritt vs. Johnson, 5 Am. Dec. 289, S. C. 32 Me. 404;

Stevens vs. Briggs, 22 Mass. 177, S. C., 54 Am. Dec. 582, and notes;

Hamlin vs. Hayford, 72 Me. 62;

Engineering Co. vs. Baker, 134 Mo. App. 96.

100. "Repair, signifies articles used to replace others which are worn out or unsatisfactory as well as repair in the sense of patchwork on decayed or worn out parts of a building."

The Standard Company were bound to repair the dredge. If the Samson engines were unsatisfactory as to power when they placed other engines on it was a repair under the last decision quoted.

"A ship is usually described as consisting of the ship, her tackle, apparel and furniture, or the steamer, her engines, tackle, etc., this includes the hull and engines, which constitutes the ship or steamer. (Benedict, 222.)"

The Endless Chain Dredge, 40 Fed. Rep. 253;
Tucker vs. Alexanderoff, 183 U. S. 424;
A Raft of Ties, 40 Fed. Rep. 596;
The City of Pittsburg, 45 *Id.* 699.

The "Richmond No. 1" was the same dredge when the Atlas engines were installed. It was the principal part of the structure. The framework and deck of the dredge had been changed to enable them to install the engines. They plugged up holes in the deck when they took them out and also took out braces. The whole thing was a trespass and the engines became a part of the dredge and the property of libellant.

VI.

It is clear that the libellant was justified in refusing to take the dredge back February 3rd, 1911, and being so justified it was entitled to rental for a much longer period than the Court awarded it.

VII.

Libellant was, as shown by the foregoing, justified in refusing to take the dredge back on account of its condition. Our contention is the Standard Company should have returned it to the United States Marshal. The libellant would then have had an opportunity of appearing in Court and having its rights determined, but the Standard people prevented it from so doing.

We respectfully submit that the lower Court should have given judgment for the libellant for rental of the dredge up to the 1st day of August, 1911, the date the

dredge was seized by the United States Marshal on an attachment in another action.

That the exceptions to the second and fourth claims of damage should not have been sustained, but that libellant should have been permitted to prove, and should have had judgment for the amount of damage it sustained by reason of the refusal of the Standard people to return the dredge and the deprivation of its possession under the admiralty stipulation.

That it was also entitled to damages for the removal of the Atlas gas engines.

That the decision of the lower Court is inconsistent in this, that it is found in the decision that libellant was entitled to the possession of the dredger "Richmond No. 1" on August 16th, 1910; that by order the Standard Company was required to give a bond to return the property, as it was on the above date and on September 14th, 1910, and the decision then holds that libellant was not entitled to it as it was on those days or either thereof.

It is therefore prayed that the said decision and decree may be modified and corrected to the extent of giving to the libellant the relief it is properly entitled to.

Respectfully.

W. H. H. HART,
Proctor for Appellee.

H. W. HUTTON,
Of Counsel.

No. 2208

IN THE

United States Circuit Court of Appeals

For the Ninth Circuit

RICHMOND DREDGING COMPANY

(a corporation),

Appellant,

vs.

STANDARD AMERICAN DREDGING COMPANY

(a corporation), CALIFORNIA RECLAMA-

TION COMPANY (a corporation), and

ATLAS GAS ENGINE COMPANY (a cor-

poration),

Appellees.

BRIEF FOR APPELLEES.

Statement of the Case.

We think it unnecessary to restate the case, since appellant's statement is in most particulars correct as far as it goes. The errors in the statement are principally errors of omission; and we think we can best aid the court in arriving at the facts by merely pointing out those particulars in which the statement is controverted by us.

The order for the release of the vessel, referred to near the bottom of page 2 of appellant's brief, in terms provided that the vessel might be released upon the giving of a *bond* in the sum of \$40,000.00, "conditioned for the return of said dredge *to the owners thereof* in as good condition as it now is and for all damages which may have been sustained by reason of its detention". The condition of the bond is correctly quoted by counsel on page 3 of the brief. We consider the words, "to the owners", a complete answer to counsel's argument that the tender by us should have been to the marshal and not to the appellant.

The claim of the Standard American Dredging Company, referred to on page 3 of the brief, reads in part as there stated:

"and makes claim to the said dredger, her engines, boilers, machinery and equipment",

but it also avers

"that it was in the possession of the said dredger at the time of the attachment thereof, and that it is the true and *bona fide* bailee of the said dredger under the charter and agreement hereinbefore referred to" (pp. 20-21).

On page 13 of the brief, the paragraph beginning "Together with the condition that it must return the said dredger 'Richmond No. 1' to the party of the second part at any time that it gave the 15 days' notice" is simply counsel's construction of paragraph 9 of the agreement, and completely ignores

the alternative which we construe as an option to retain the dredger "Richmond No. 1" and pay the appellant \$50 a day therefor.

The statement on page 15, that the Standard American Dredging Company had the dredger "Richmond No. 1" about two years and four months, is incorrect. The testimony clearly shows that the Standard American Dredging Company never had the dredger "Richmond" at any time prior to the date of the first charter, February, 1909. Counsel says "The 'Richmond No. 1' was built September, 1907. Libelant operated it altogether about eight months". The evidence shows that the Richmond Dredging Company used the dredger for work at Richmond from the time it was built until the month of June, 1908; that the dredger was then used by the California Reclamation Company at San Rafael about four months, and subsequently by the Richmond Dredging Company at San Rafael for about two months. The use of the dredger by the Standard American Dredging Company, including all time consumed in moving it from place to place, was from February, 1909, to December 2, 1910, when the work at Walnut Grove was completed, a total of one year and ten months. After that, the dredger remained in the possession of the Standard American Dredging Company undergoing repairs until its tender to the Richmond Dredging Company on February 3, 1911; and, of course, the Standard American Dredging Company retained possession after the appellant had refused

to receive it, until it was again placed in the possession of the marshal under attachment in August, 1911.

Counsel's statement completely ignores the fact that the Samson engines were *used* by the Standard American Dredging Company for seven months and six days only (pp. 350-403).

The statement on page 15, that the Standard American Dredging Company did work with the dredger "Richmond" at San Rafael, is not true, and has no word of evidence in support of it.

These incorrect statements of fact as to the use of the dredger "Richmond No. 1" by the Standard American Dredging Company are important, because appellant's assertion that the Standard American Dredging Company wore out the Samson engines is the basis of its claim that the Atlas engines were placed upon the dredger by way of repair. On page 16 of the brief, the statement is made that the appellee took off the Atlas engines and put the Samson engines back again, "worn out, out of repair and useless as gas engines".

After stating briefly Mr. Musladin's testimony, the brief, near the bottom of page 16, says:

"The Standard Company subsequently put the engines back on the 'Richmond No. 1', *gave them a coat of paint*, and they produced testimony as to their condition; their witnesses largely consisting of a Mr. Harding and a Mr. Knight and some others, who went there and saw the engines the day before they testified. At that time the dredge was in the custody of

the United States Marshal, and he would not allow them to take any of the engines apart, so the only examination they could make was what they could observe just by looking at them."

Then, after quoting from Knight's testimony regarding the examination that had been made the day before he testified, counsel says:

"This is not a case of conflict of testimony; it is a case where the witnesses for the libelant have made careful examination and witnesses for the claimants have made no examination at all that made their testimony of any value."

The statement that respondent "gave them a coat of paint" is evidently intended to mean that it did nothing else.

The portions of the statement just referred to, with a lack of candor that is indeed surprising, omit all reference to the positive testimony of our witnesses as to the condition of the Samson engines and the service rendered by them just prior to our discontinuance of their use, and the positive and uncontradicted testimony of Barker and Morrison, covering pages 517 to 593 of the transcript, that immediately prior to the tender of the dredger to the libelant five days were expended in putting the engines into good condition. The statement also ignores the opinion of the court below, pages 1005-1006,

"that the dredger with the re-installed Samson gas engines was, when tendered to the libelant, on February 3, 1911, in as good condition, reasonable wear and tear excepted, as when pos-

session thereof was received by the defendant dredging company under the agreement of February 26, 1910”.

We do not know what proctors mean by the expression, “and claimant’s witnesses state to the above effect”, on page 17 of their brief. If this is intended to mean that any of claimant’s witnesses agreed with Mr. Musladin that at the time of the tender the dredge was not in a condition to be operated, it is unsupported by any testimony in the case. In fact, Mr. Musladin’s own testimony was merely a statement of his opinion as to the condition of the engines at the time of his examination of them long prior to the making of the repairs that immediately preceded the tender. There is nothing in the evidence to show that Mr. Musladin knew anything about the condition of the engines at the time of the tender; and the only testimony as to the condition of the engines at that time was that adduced by us.

On page 18 of the brief, the following paragraph, forming part of the statement of the case, occurs:

“Libelant refused to accept the dredge when tendered on account of its not being in the same condition as when received, or as when the admiralty stipulation was given.”

It is true that the libelant refused to accept the dredge for the reason that it was not in the same condition in respect to the engines as when the admiralty stipulation was given; but it is not true that any objection was made that the dredger was

not in the same condition, or as good condition, as when it had been received by the Standard American Dredging Company. On the contrary, the evidence is without conflict that the only objections to the tender were that the Atlas gas engines had been removed and the Samson engines re-installed, and that the tender should have been made to the marshal and not to the libelant.

IS THIS A CASE OF ADMIRALTY JURISDICTION?

We should be deeply regretful if this court should feel constrained to decide this question in the negative, since the cause has been tried at great expense and has reached a point where the ends of justice would be best subserved by a final decision in this court. Nevertheless, the authorities are such as to leave our minds in grave doubt upon this point; and, since we understand the rule to be that jurisdiction of the subject matter cannot be conferred by consent or by failure to object, we feel it to be our duty to present our views upon the subject.

The dredger "Richmond No. 1", which is the subject of the action, is, according to the evidence, of practically the same character, and was at the time of her seizure engaged in the same occupation, as the dredgers that were before the courts in the cases of

In re Hydraulic Steam Dredge No. 1, 80
Fed. 545;

Bowers v. Federal Contracting Company,
148 Fed. 290; affirmed in 153 Fed. 870.

The testimony of Perry (pp. 745 to 753), with the exhibits, fully describes the dredger and its method of operation; the agreement between Southern Pacific Company and Standard American Dredging Company (pp. 754-759) shows the object and character of the work done at Walnut Grove. The testimony of Perry (page 760) further shows that the railroad fill was the only work in contemplation; that the material was taken from the most available places ("pot-holes", as the witness termed them) in the bed of the Sacramento River, and without any design or effect of improving or otherwise affecting the navigability of the river. In the case first cited (*In re Hydraulic Steam Dredge No. 1*, 80 Fed. 545-557 et seq.), the Circuit Court of Appeals for the Seventh Circuit held that it was not necessary to decide whether or not the dredger was a vessel, and decided the case upon the ground that, assuming that it was a vessel, it was not engaged in maritime employment, and for this reason affirmed a decree dismissing a libel for coal furnished to the dredger while engaged in that occupation.

In the other case cited (*Bowers Hydraulic Dredging Co. v. Federal Contracting Co.*, 148 Fed. 290), the libel was for charter money for a dredger similarly described, and engaged in a similar occupation. Adams, D. J., quotes copiously from the decision in 80 Fed., *supra*; and then places his decision favorable to the jurisdiction squarely upon

the supposed effect of the decision of the Supreme Court in

The Blackheath, 195 U. S. 361; 49 Law Ed. 236.

Judge Adams says (p. 294):

“Upon the above authorities, it would seem that the question of jurisdiction here should be decided in favor of the respondent, but the admiralty jurisdiction has been broadened very considerably by the recent decision of the Supreme Court in ‘*The Blackheath*’ (195 U. S. 361, 25 Sup. Ct. 46, 49 Law Ed. 236). * * * It seems in view of what has been said in this authority that such artificial distinctions as arise out of the work of a dredge being performed partly on land and for the purpose of a land transaction, should not oust the court of jurisdiction of a floating structure which in its ordinary purpose is distinctly maritime.”

But in two later cases, the Supreme Court distinctly disavowed any intention in *The Blackheath* to overrule any of its former decisions, and added,

“We are not inclined to disturb the rule that has been settled for so many years because of some supposed convenience.”

Cleveland T. Ry. Co. v. Cleveland Steamship Co., 208 U. S. 316; 52 Law Ed. 508;

Duluth & S. B. Co. v. The Troy, *ibid.*, p. 512;

In *The Poughkeepsie* (162 Fed. 494) Judge Adams explains his decision in the Bowers case, *supra*, by saying that it was based upon his assumption that *The Blackheath* case had so broadened the jurisdiction as to cover dredging which had theretofore been deemed non-maritime.

There is at least negative authority in this Circuit for the doctrine of *In re Hydraulic Steam Dredge No. 1, supra*, that a hydraulic dredge must be engaged in maritime service in order to be the subject of admiralty jurisdiction.

In *McRae v. Bowers Dredging Company*, 86 Fed. 344, Judge Hanford says (p. 346):

“The main question in the case is whether the dredgers are vessels subject to admiralty process, *whether the work which they were doing was a maritime service*, whether the contracts under which they were supplied and kept in repair were maritime, and whether the crews have maritime liens for their wages.”

And in a recent case this court say:

“A floating dredger, capable of carrying her own machinery and implements and working crew, *when employed as an aid to commerce in deepening navigable channels and harbors*, is subject to maritime law and to a maritime lien for a tortious injury to another vessel caused by negligence of those controlling her operations.”

North American Dredging Co. v. Pacific Mail Steamship Co., 185 Fed. 698-702.

AT THE TIME THE LIBEL WAS FILED AND THE DREDGER SEIZED BY THE MARSHAL, STANDARD AMERICAN DREDGING COMPANY WAS HOLDING OVER UNDER AN ALTERNATIVE OPTION GRANTED TO IT BY THE TERMS OF THE CHARTER PARTY OR AGREEMENT OF FEBRUARY 26, 1910.

We understand the position of counsel for the libelant to be that the right of the Standard Amer-

ican Dredging Company to hold and use the dredger "Richmond" terminated on August 16, 1910, when the "Oakland" was returned; that we had no right to retain the "Richmond" after the receipt by us of the "Oakland"; and that our holding after that time was a wrong.

The late Judge De Haven was of the opinion that under the contract it was our duty to return the "Richmond" when we demanded and received the "Oakland", and that our retaining it beyond that time was a breach of contract.

It has at all times been our understanding, and is now our contention, that under the provisions of clauses 9 and 10 of the charter party and agreement of February 26, 1910, we had the right, on recalling the "Oakland", to do either one or the other of two things: first, to return the "Richmond" to its owner; or, second, to retain the "Richmond" on paying an increased rental of \$50 a day. But, if the "Oakland" should not be recalled prior to the completion of 400,000 cubic yards of filling, then the rental of the "Richmond" should continue to be \$800 a month, and that we should have the right to lease her at that price, when not in use or required by the owner, up to January 1, 1911.

The testimony shows that clauses 9 and 10 were revised by the officers of the two companies without the aid of counsel, and, as Judge De Haven well said in his opinion, "It is not a model of clearness"; but we think that, if the rule requiring every

part of a contract to be given effect if possible is to be obeyed, this charter party must be construed as granting to the Standard American Dredging Company the alternative of returning the "Richmond", or holding over on terms. By the use of italics, the alternative options can be thrown into relief, which may aid in the construction of paragraph 9:

"9. If at any time during the term of this agreement, or any extension thereof, the party of the first part (Standard American Dredging Company) shall secure work which it desires to do by the use of said dredger 'Oakland', it may *at its option* either require the party of the second part, after fifteen days' notice in writing, to operate said dredger 'Oakland' twenty-four hours each day until 400,000 cubic yards of filling * * * shall have been completed, *or* to terminate this lease of the said dredger 'Oakland' by giving the party of the second part fifteen days' notice of such termination, *and* returning the dredger 'Richmond No. 1' to the party of the second part, as in said charter provided, *or* paying the party of the second part at the rate of \$50 a day *for the said 'Richmond No. 1'* for all time it shall be retained by the party of the first part after the expiration of said fifteen days' notice, and the return of the 'Oakland' to the party of the first part" (p. 1061).

In the charter of October 18, 1909, as well as in paragraph 9 of the charter of February 26, 1910, the possibility of the Standard American Dredging Company desiring to hold over is recognized. In the first charter the language is as follows:

“Second party further agrees to deliver dredge, pipe and all equipment, to and in the canal at Richmond by the 31st day of January, 1910, otherwise *rent will be charged therefor at the rate of fifty (\$50.00) dollars per day.*”

In the two rejected drafts of the charter of February 26, 1910, the \$50 a day is referred to as increased rental (pp. 1054-1069); and it is so denominated in paragraph 7 of the charter that was finally signed. The language is:

“In consideration of the execution of this agreement, all claim of the party of the second part to *increased rental* or other charge by reason of the detention of the ‘Richmond No. 1’ beyond the terms of said charter is hereby waived”, etc. (p. 1060).

Counsel for appellant have not made clear (to us) just how they construe paragraph 9 of the charter. They say, on pages 21 *et seq.* of the brief, that, at the time the dredger was released to us, we were not holding under any charter, but that our detention of the dredger was a wrong. Beginning near the bottom of page 28, they say that, “Taking the charter parties as a whole and all together, it is clear that the \$50.00 per day only had reference to the case of the detention of the dredger when it was permitted by the libellant”. And in oral argument counsel said, “unquestionably the \$50 a day ended when the charter party ended. The contract did not continue in force after August 16th”.

Yet appellant is suing on the contract for the \$50.00 a day, and complains that the allowance of

rental at that rate, in the judgment below, was for an insufficient time.

The demand of September 1, 1910, which is attached to the libel and made a part of it (pp. 57-58) claims the rental of \$50 a day under the charter in the following words:

“You will further take notice that Richmond Dredging Company will claim fifty (\$50.00) dollars per day for the use of said dredger ‘Richmond No. 1’ for every day that it is entitled to claim that amount under the agreement by virtue of which you hold said dredger or otherwise”.

We cannot reconcile these inconsistencies, but we venture the suggestion that they have their basis in the desire of libelant to hold to the contract for the purpose of collecting the “increased rental” in any event, and at the same time claim that the contract had been terminated and had no further vitality for the purpose of recovering the Atlas engines and special damages.

Counsel say in effect that the \$50 a day was payable only in case we were permitted by the owner to retain the “Richmond”. If that be true, the demand for the \$50 a day, followed by a suit in which the charter and the demand are pleaded in terms, would seem to constitute the necessary permission. Accepting counsel’s construction of clause 9, does not the notice of September first say in effect: “We have use for our dredger, we require it; therefore, section 10 of the charter does not apply. You

must either return it to us, or pay us the increased rental provided for by the charter.”?

This is not our view of the charter and the conduct of the parties following the recall of the “Oakland”; we merely submit it as an answer to counsel’s strained construction of paragraph 9. We maintain that permission from the appellant was not necessary; that, in the event of our recalling the “Oakland” prior to the completion of 400,000 cubic yards of filling, we had two alternative options: either to return the “Richmond”, or to retain her and pay a rental nearly double what we had been paying theretofore.

The provisions of section 9 of the charter are essentially similar to the contract in the case of

Smith v. Bergengren, 153 Mass. 236; 26
Northeastern 690; 10 L. R. A. 768.

In that case plaintiff was a physician intending to practice his profession in Gloucester. Defendant was already practicing there. Plaintiff purchased defendant’s furniture and the good-will of his profession as a physician, and defendant covenanted that he would not practice his profession of a physician at Gloucester so long as Smith should be engaged in practice as a physician there, with the proviso that he should have the right to engage in such practice at Gloucester at any time after five years by paying Smith \$2,000, but not otherwise. The excerpts from the briefs of counsel in 10 L. R. A. show that the defendant argued that

the provision for the payment of \$2,000 was in the nature of a penalty, and that plaintiff was entitled to recover his actual damages only; while counsel for the plaintiff argued that the provision for the payment of \$2,000 must be taken as a provision for liquidated damages. But in delivering the opinion of the court, Holmes, J., said:

“This sum of \$2,000 was not liquidated damages, still less was it a penalty. It was not a sum to be paid in case the defendant broke his contract and did what he had agreed not to do. It was a price fixed for what the contract permitted him to do if he paid.”

And again,

“But this case falls within the language of Lord Mansfield in *Lowe v. Peers*, 4 Burr. 2225, 2229, that if there is a covenant not to plough, with a penalty in a lease, a court of equity will relieve against the penalty; ‘but if it is worded “to pay £5 an acre for every acre ploughed up”, there is no alternative, no room for any relief against it, no compensation; it is the substance of the agreement’.”

If this construction is correct, it follows that the action was brought prematurely. There is, however, another possible construction of the charter—that which was adopted by the court below, i. e., that we were required to return the “Richmond” when we recalled the “Oakland”. We shall now consider this construction under another head.

IF THE CONTRACT BE CONSTRUED AS REQUIRING THE RETURN OF THE "RICHMOND" ON THE RECALL OF THE "OAKLAND", THE PROVISION FOR THE PAYMENT OF \$50 A DAY WAS A LIQUIDATION OF THE DAMAGES FOR HOLDING OVER.

Unless section 9 of the charter party is to be wholly ignored, there are only two alternative constructions of the charter. First, that we had the right, on recalling the "Oakland", to retain the "Richmond" on paying an increased rental of \$50 a day; or, second, that the contract required us to return the "Richmond" when we recalled the "Oakland", and that our failure to do so was a breach of the contract. If the latter construction be adopted, then the provision for the payment of \$50 a day must be either a penalty or a liquidation of the damages for breach of the contract. If it was a penalty, it could not be recovered for reasons that are too well settled to require the citation of authorities. On the other hand, if it was a liquidation of damages, the Standard American Dredging Company is bound to pay the agreed amount, neither more nor less; and the Richmond Dredging Company is entitled to recover the agreed amount, neither more nor less.

By far the greater number of cases in which the question, whether the sum named in a contract to be paid in case of its breach is a penalty or a liquidation of damages, are cases where the party in default seeks to show that the stipulated sum is a penalty, and to relieve himself of the obligation

to pay more than the actual damages. In such cases the innocent party endeavors to establish the liquidation of damages, so as to recover the entire amount.

But the rule is the same where the innocent party claims the stipulated sum to be a penalty, and seeks to recover actual damages in excess of the stipulated amount. If the courts find that the damages have been liquidated by the contract, they will hold the liability of the party in default to be limited by the stipulated sum.

Morrison v. Ashburn, 21 Southwestern 993;

Kemp v. Knickerbocker Ice Co., 69 N. Y. 45;

Jackson v. Hunt, 56 Atl. 1010;

Yoder v. Strong, 76 Atl. 176.

Where a lease provided for the payment by the lessee of double rent for such time as the lessor should be kept out of possession after the end of the term, it was held that such double rent was not a penalty but a liquidation of damages.

Walker v. Engler, 30 Mo. 130.

And in a more recent case in Illinois, a long-time lease reserved rent at the rate of \$500 a month, and provided that, if the tenant held over after the term, he should pay \$30 a day liquidated damages. There was evidence when the lease expired that the premises were worth \$7000 a year. Held: that the damages fixed should not be considered as a penalty as they were not unconscionable.

Poppers v. Meager, 35 Northeastern 805.

These were both cases where the tenant holding over sought to limit his liability to actual damages; but the principle is the same, whether one party or the other endeavors to re-open the question of the measure of damages.

**THE DISTRICT COURT DID NOT ERR IN SUSTAINING THE
EXCEPTIONS TO CLAIMS OF DAMAGE II AND IV OF THE
SUPPLEMENTAL LIBEL.**

(a) If the contract be construed as granting the Standard American Dredging Company the right to hold over at an increased rental, which we insist is the proper construction, it goes without saying that the appellant was entitled to the increased rental, but not to damages, since our holding over was a matter of right.

(b) If the contract be construed as it was construed by the District Court, that is, that Standard American Dredging Company was bound to return the "Richmond" on recalling the "Oakland", and that the failure so to do was a breach of the contract: then the provision for the payment of \$50 a day was a liquidation of the damages for breach of the contract, and the appellant is not entitled to any other damages.

(c) Taking the extreme view which counsel now present, that all contracts between the parties ended on the recall of the "Oakland" and the libelant's demand for the "Richmond", and that our detention of the "Richmond" after that time was not

a breach of contract but a wrong: then it is clear that libelant was not entitled to recover the \$50 a day at all, but must sue for his general damages and special damages, if he can show them. If the contract has sufficient force to justify a suit upon it for the sum named as rental or liquidated damages, it has sufficient force to limit the recovery to that amount. Under no possible construction of the contract, or what occurred under it, or in breach of it, and under no theory of law, could the libelant be entitled to the rental or liquidated damages for the detention of the dredger and also general or special damages.

(d) Even assuming this to be one of those cases where it is said that a breach of contract amounts to a tort, the libelant was put to its election between suing on the contract or for the tort, and has elected to sue on the contract.

15 Cyc. 254 b, and cases there cited.

In so far as this is an action for the recovery of money, it is essentially an action on the contract. Not only is the charter pleaded according to what the libelant conceived to be its legal effect, but a copy of it is attached and made a part of the libel. There is also attached to and made a part of the libel as the foundation of the suit, the demand of the Richmond Dredging Company for the return of its dredger, in which occurs the following language (p. 58):

“You will further take notice that Richmond Dredging Company will claim fifty (\$50.00)

dollars per day for the use of said dredger 'Richmond No. 1' for every day that it is entitled to claim that amount under the agreement by virtue of which you hold said dredger or otherwise."

That notice in itself constituted an election to stand upon the contract, and the election was renewed by bringing suit upon the contract for the stipulated sum named in it.

15 Cyc., 259-V, A and C.

In considering respondent's exceptions, the District Court had before it the second amended libel and supplemental libel which pleaded and relied upon the contract and the demand; and it thereupon became necessary for the court to construe the contract either as granting an option to hold over or providing for liquidated damages. Under either construction, the stipulated sum was the maximum to which libelant was entitled. Therefore, the exceptions to the claims of special damage were properly sustained.

(e) Considering the second claim of damage independently of the remainder of the libels, it fails to state a cause of action for special damages, and is indefinite and uncertain; and, therefore, the exceptions were properly sustained. The pleader evidently endeavored to state a case for special damages founded upon respondent's knowledge of special circumstances within the rule of

Hadley v. Baxendale, 9 Exch. 341;

but the attempt is a failure. The mere fact that respondent knew the existence of the City of Rich-

mond contract, and that the libelant would require either the "Oakland" or the "Richmond" for the purpose of doing the work, is insufficient.

Hadley v. Baxendale, supra;

Powers v. Stillwell, 139 U. S. 199; 35 L. Ed. 147;

Central Trust Co. v. Clark, 92 Fed. 293;

Layman v. Speer Hardware Co., 198 Fed. 453.

The loss that would have "followed naturally from the great multitude of cases", where one required a dredger to perform a contract, would be the rental value of some other dredger used as a substitute. The special circumstances that would bring the case within the rule would be that the "Oakland" and the "Richmond" possess peculiar qualities that are not common to hydraulic dredgers, and that it would be impossible to procure a substitute. Knowledge of these facts at the time of the making of the contract would have to be shown, as subsequently acquired knowledge could not affect the rights or obligations of either of the parties. The libel here simply shows knowledge *at or about* the time of the making of the contract of the existence of the City of Richmond contract, and that libelant would require one or the other of the dredgers to perform that contract. There is not even an allegation that libelant made any effort to procure another dredger.

Furthermore, the damages pleaded were not the proximate result of the holding of the "Richmond".

Assuming that the libelant was compelled to break its contract with the City of Richmond for lack of a dredger, the measure of damages would be the difference between the contract price for the unfinished work and the additional cost, if any, to the City of Richmond of having that work done by others. The city would not have the right to appropriate the work already done and refuse to pay for it, without libelant's consent. There is nothing in the claim of damage to show how much work had yet to be done, or what the amount of damages would be. It appears that the libelant voluntarily agreed to forego the cost of the work that it had done, in order to escape from the contract. We certainly cannot be held responsible for this loss, which was sustained by the voluntary agreement of the libelant without, so far as the libels show, any effort to complete the performance of that contract; although with the extension of time that it had from the city, it had eight months after we recalled the "Oakland" within which to obtain another dredger to complete its contract.

**THE APPELLANT IS NOT ENTITLED TO RECOVER THE RENTAL
OF \$50 A DAY FOR ANY TIME AFTER THE TENDER OF
THE DREDGER ON FEBRUARY 3, 1911.**

On pages 19 and 43 of their brief, counsel present the question, "Was not the libelant entitled to the sum of \$50.00 per day for the use of the dredger for the period up to and including the 1st day of

August, 1911, instead of the limited period for which the court awarded it?"

It is undisputed that on the 3d day of February, 1911, the Standard American Dredging Company placed the dredger "Richmond No. 1" in the canal at Richmond in charge of a watchman; and on February 3d, and again on February 6, 1911, wrote to the Richmond Dredging Company offering performance by redelivery of the dredger (pp. 804-805-806). Counsel admit the making of the tender (brief, p. 17).

The evidence shows without conflict that at the time of the tender the dredger was in as good order and condition as it was at the date of the charter party, reasonable wear and tear excepted (pp. 344, 355, 519-525, 576-581); and Judge De Haven so found (pp. 1005-1006).

The appellant made no objection that the dredger was not in as good order and condition as it was at the date of the charter party, but places its refusal to accept the tender upon the grounds that the Atlas gas engines had been removed, and that, as we had received the dredger from the marshal under the admiralty stipulation given in the case, it was our duty to return it to the marshal and not to the libelant. It does not appear that these objections to the offer of performance were made at the time of the tender, or at any time after the tender; but Mr. Cutting, the president of the libelant, gives these reasons for not accepting the dredger and for not making any objection to the offer of perform-

ance (pp. 243-244). [It will be noted at the bottom of pages 244 and 245 that it was stipulated that the Richmond Dredging Company wrote a letter to the Standard American Dredging Company in answer to its letters of February 3d and 6th, and that that letter was in evidence; but this seems to have been a case of mutual mistake, as no such letter appears anywhere in the record.]

If the libelant had any ground upon which to object to our offer of performance, it was required to make the objection at the time of the offer, and any objections not so made were waived.

Civil Code, section 1501;

Code of Civil Procedure, section 2076.

Under these sections, which are but a restatement of the general law upon the subject, libelant cannot now be heard to say that the dredger was not in all respects in proper condition for redelivery.

The libelant has thus estopped itself from objecting to the tender as made upon any ground whatsoever, unless it can maintain its position that the admiralty stipulation required us to return the dredger to the marshal, and that a tender to the libelant was ineffectual, no matter what the condition of the dredger might be. We shall discuss the effect of the admiralty stipulation under a separate head.

But, assuming for the sake of argument that the dredger was not in as good condition as it was required to be by the terms of the charter party,

that the Standard American Dredging Company had worn out and discarded the Samson engines and that libelant was entitled to the Atlas engines, and for the purpose of argument waiving libelant's estoppel by failure to object at the time of the tender, nevertheless, the libelant has no right to recover rental for any time subsequent to the tender. If the condition supposed had existed, the only remedy of the libelant would be an action for damages for breach of the covenant by the Standard American Dredging Company to return the dredger in as good order and condition as when received, reasonable wear and tear excepted.

Counsel for the libelant have not cited a single case, either in this court or in the District Court, and the most exhaustive research on our part has failed to discover a case, which such a doctrine as that contend for has been even asserted, to say nothing of being sustained. The books contain many cases of actions for the value of repairs under charters or contracts of hire, where the charterer or other bailee had agreed to keep the vessel or other hired property in good condition; but we have been unable to find a case where the owner was permitted to reject a tender of the vessel or other hired property and charge rental for its use upon the ground that when tendered the chattel was not in as good order and condition as it was by the contract required to be. The case most nearly approaching this in principle is

City of Detroit v. Grummond, 121 Fed. 963;
58 C. C. A. 301.

In that case the City of Detroit chartered a vessel for the purpose of using it as a hospital. The charter contained a stipulation as follows:

“and at the end of said term will return the said boat to the said party of the first part, his representatives or assigns, at the Port of Detroit in like good condition as when taken, reasonable use, wear and tear excepted.”

The charter contained a further provision that,

“if the vessel should be lost or destroyed by reason of any peril, risk, or cause not insured against, said party of the second part shall pay to the party of the first part the sum of \$12,000 as the value of said vessel”.

The vessel was badly injured by fire, and was tendered to the owner, who refused to receive it and brought an action for the stipulated value. On appeal to the Circuit Court of Appeals for the Sixth Circuit, the cause was heard by Lurton, Day and Severens, JJ.; and on page 572, the court say:

“It is contended for the defendant in error, and this seems to have been his theory when he refused the tender of the vessel at the expiration of his lease, that the city had no right to return the vessel unless she was returned in as good condition as she was at the time she was leased. But is this the proper construction of the contract? We do not think it was intended that the title to the vessel would pass to the city in consequence of a breach of the stipulation referred to. It was the common case of the hiring of property for a specific term. The hirer would, by implication, be bound to return the thing hired, and the gist of the stipulation is that when returned she

should be in as good condition as when received. For a breach of this stipulation the lessor would have his remedy for the damages arising from the depreciation in the value of the thing hired in consequence of the breach. But the lessor cannot treat the thing hired as sold, and recover its value of the lessee. We think, therefore, that this contention of the defendant in error cannot be maintained, and that it did not follow that, because of the damaged condition of the vessel, he was entitled to refuse to accept her, and thereupon to demand the \$12,000 as her value."

The only difference in principle between that case and the case at bar is that in the Grummond case the owner endeavored to force the entire legal title upon the charterer and recover the stipulated value because the vessel was not in proper repair; but in the case at bar the owner seeks to force upon the charterer an indefinite term of hiring at a high rate of rental, or its equivalent by way of damages for detention long after the owner could have had the use of the vessel.

If our construction of the contract is correct, and we were holding over under the charter party, we had the right to terminate the charter at any time, and, of course, the rent would stop when we made the tender. On the other hand, if we had not the right to hold over, then the rule is plain that one injured by breach of a contract or even a tort must use all reasonable means to render the injury as light as possible.

13 Cyc., 71 to 73, and cases there cited.

It was, therefore, the duty of the libelant to receive the dredger when tendered, and, under no possible theory of the relations between the parties can the respondent be charged with \$50 a day for any time after the date of the tender.

**APPELLANT HAS NO RIGHT TO RECOVER THE ATLAS GAS
ENGINES OR THEIR VALUE OR DAMAGES FOR THEIR
REMOVAL.**

There is no conflict of evidence upon the point that the Atlas engines were temporarily installed upon the dredger merely for the purpose of furnishing sufficient power to do the work at Walnut Grove; that we had no intention whatever of leaving these engines on the dredger; and that they could be, and were, removed without in any wise injuring the dredger itself.

Counsel quote several pages from the testimony of our witness, W. J. Knight, showing how he installed the Atlas engines, but they ignore the testimony of the same witness that the removal of the engines was effected without in any wise injuring the dredger (pp. 354-355). The case is, therefore, clearly within the provisions of section 1025, C. C., which is quoted by counsel on page 39 of their brief. The expression, "*and cannot be separated without injury*", clearly implies that, if the different parts *can* be separated without injury, the merger of ownership does not occur.

Counsel also cite section 1031, C. C., but it requires no argument to show that this section is not applicable to this case. It is manifestly absurd to say that, when the charterer of a vessel removes the engines on it and temporarily installs other engines in their place, he "willfully uses the materials"—the hull and all other machinery of the dredger—of another without his consent.

We have examined the cases cited by counsel on pages 33 to 43, inclusive, and none of them is in point here.

Guckenheimer v. Angevin; *Hartford & N. H. R. Co. v. Grant*; and *The Edwin Post* are not even remotely in point.

Porter v. Pittsburg Steel Co.; *Evans v. Kisler*; *Phoenix Iron Works v. N. Y. S. & T. Co.*, are all cases of additions to mortgaged railway property, which were held to be subject to the mortgages.

Glover v. Austin holds that the sale of a keel of an unfinished vessel drew after it all the subsequent additions.

Kelley v. Border-City Mills holds that a boiler situated in a building adjoining a mill and used to supply steam to the mill is part of the realty, and for repairs on the boiler a lien may be maintained on the land itself.

Arnott v. Kansas Pac. R. R.; *Cousin's Appeal*; *Merrit v. Johnson*; *Stevens v. Briggs*, are all cases of which there are many others, holding that the owner of materials which are used to make a new

product acquires the finished product; or, if there is a commingling of materials, the product belongs to the owner of the principal part of it. In none of these cases was there any discussion of the separability of the materials.

Hamlin v. Hayford is another case holding that repairs and improvements made upon the rolling stock of a railroad are in the nature of accessions to the mortgaged property and subject first to the mortgage that had priority of date.

Engineering Co. v. Baker holds that a hot water plant installed in a building was an integral part of the building and not a separate structure, hence that the company installing the hot water plant was not entitled to a mechanics' lien on such plant prior in right to an incumbrance on the real property.

Southworth v. Isham would be applicable only if respondent had worn out the Samson engines, which is not true. Furthermore, the decision is by a trial court, and is not supported by the citation of authorities, and is at variance with the authorities which we shall cite and the plain provisions of our code.

It is to be observed that the subject of accession to real property is placed in Chapter 1 of Title 3 (sections 1013 to 1019), C. C., and accession to personal property in a separate chapter immediately following it. This division is in consonance with the common law. The differences in

the principles governing the two species of property, are too well known to call for argument. Decisions having to do with the law of fixtures and accessions to real property are, therefore, of little value in solving a question involving accession to personal property.

The leading American case on the law of accession to personal property is *Lampton's Executors v. Preston's Executors*, 1 J. J. Marshall 454; 19 Am. Dec. 104.

In the opinion of Robertson, J., on rehearing (19 Am. Dec. 109), it is said:

“When the authorities speak of rights by ‘accession’ they generally mean accession of other materials, as well as skill or labor; as in the case of the cloth manufactured out of the wool of a stranger, and of the manufacturer. Here the fabric would belong to the manufacturer, because the several parcels of wool could not be identified and separated. For, to acquire a title by ‘accession’ of materials, not only must the commixture be *bona fide*, but the materials which belong to another must be incapable of being restored to him in their original form, that is, the material must not possess all its original distinctive qualities; if it does, there has been no specific change in the nature or elements of the thing.”

In a typical case, the Supreme Court of Michigan say:

“The question whether Fowler was justified in taking by virtue of his mortgage any new material which had been brought into the establishment (a printing office) since the mortgage

was given, is not fairly presented by the record. But as that question is in the case, and there has been an attempt to present it, and, moreover, as it is likely to arise on a new trial, we deem it proper to say, that if the new material was purchased to supply the wear, decay and destruction of old, *and was so commingled with the old as not to be readily distinguished, it would become a part of the mortgaged property by accession; otherwise not.*"

Fowler v. Hoffman, 31 Mich. 215-223; citing *Wetherbee v. Green*, 22 Mich. 315; 7 Am. Rep. 653.

A case identical in principle with the case at bar is

Clark v. Wells, 45 Vermont 4; 12 Am. Rep. 187.

The opinion is short, and we shall give it in full:

"Redfield, J. This action is trover for the alleged conversion of the wheels and axles of a wagon.

"The case shows that a stage-wagon was sold by Bridgman to Harrington, with the condition that said wagon was to remain the property of said Bridgman until the price was paid; and that the purchase-money was never paid. That afterward, at the instance of Harrington, plaintiff repaired said wagon by substituting new wheels and axles for the old.

"That Harrington took the wagon, thus repaired, from plaintiff's shop, without his knowledge or consent. Afterward, Harrington gave his note to the plaintiff for such repairs, with the condition and agreement that the running part of said wagon should remain the property of the plaintiff until said note was paid. Bridgman thereafter took posses-

sion of the wagon, with the new gear added by plaintiff, and sold it to the defendant, without knowledge of plaintiff's claim.

"The defendant is a *bona fide* purchaser without notice of any right or equity on the part of the plaintiff. The plaintiff's lien for repairs upon the wagon was personal, and was waived by allowing the wagon to go back into Harrington's possession, and taking his note for the repairs, and security upon the parts of the wagon supplied by himself. He must, therefore, stand upon the *contract* between himself and Harrington.

"We think the ordinary repairs upon a personal chattel, such as making new bolts, nuts, thills, and the like, become accretions to, and merge in, the principal thing, and become the property of the general owner. But in *this case* the wheels and axles constitute the running part of the wagon. They could be followed, identified, severed, without detriment to the wagon, and appropriated to other use without loss. The plaintiff was the owner, and never parted with the property. He had the right to resume possession when Harrington failed to pay the note. The property remained in him as perfectly as if, in the exigency of a broken wheel, or axle, he had loaned them for temporary use. Without questioning the main position of defendant's counsel, we think, under the facts stated in this case, the property in those wheels and axle continued in the plaintiff, and that an action lies for the conversion.

"Judgment affirmed."

To the point that the testimony shows without conflict that the engines were removed and replaced without impairing the dredger or the engines in any way, we cite the testimony of Knight, pages 343, 354, 355, 374, 375, 376, 377, 391.

Counsel say (p. 40 of their brief) that the taking off of the Samson engines by the Standard American Dredging Company was a trespass, and then, with that fatuous logic which is ever ready to adopt any premise which will include the preconceived conclusion of the reasoner, argue, on page 41, that having committed this trespass, it was a further trespass to make amends by replacing the property in its previous condition. If, as counsel said in oral argument, the owner of the dredger was satisfied with the Samson engines and objected to their removal, it should at least give credit to the Standard American Dredging Company for having repented of its sin and shown its repentance in the best of all possible ways—by restitution. Counsel also say that we had the right to repair the dredger, by replacing the Samson engines with better ones, but that we had no right to make a temporary substitution. In short, any argument will serve that leads to the desired conclusion, the acquisition of the Atlas engines by the libelant. Even if it was a trespass to remove the Samson engines, the libelant would be entitled to no more than the damages suffered and the restoration of the engines would be a perfect defense.

But there was no trespass. The Samson engines were taken off during the term of the charter party. There is no question about that. And we submit that under the terms of the charter party we had the right to make this temporary change, or any other change that would not impair the dredger, so long as we finally returned the dredger to its owner in

as good order as it was when it was received by us, reasonable wear and tear excepted. Upon this point, Mr. Perry, president of Standard American Dredging Company, and Mr. Cutting, president of Richmond Dredging Company, seem to agree. Mr. Perry (p. 829) says:

“I would assume that you have a right to return the dredger and I would expect the return of the dredger in as good condition as received, according to the terms of the charter party; I would not care what you did or you did it; that is what I would expect when I got the dredger back, as long as the dredger was in the condition provided for under the charter party.”

Mr. CUTTING (p. 720). “Q. With the motor on, did you understand that the engines had been taken off and been (re) placed by the motor at Eureka?

“A. I don't know as I understand very much about it. I did not make any inquiry. The charter party of Oct. 18th provides that they were to make all repairs and return the boat to us in the condition to immediately start work, and it was guaranteed by Mr. Perry personally, and whatever they chose to do with the boat I did not consider any of my business particularly until they brought it back, and then I expected them to return the boat in accordance with the terms of their charter party.”

THE SAMSON ENGINES WERE NOT WORN OUT AND THE ATLAS ENGINES WERE NOT PLACED ON THE DREDGER BY WAY OF REPAIR.

Counsel say (p. 16 of their brief):

“When the Standard company had finished its contract at Walnut Grove it towed the

dredge back to San Francisco Bay, and then took off the Atlas engines and put the Samson engines back on the dredge again, worn out, out of repair and useless as gas engines."

And, again, on page 41:

"The Standard people were bound to repair this dredge, if, as is claimed by libelant, they put the Atlas engines on when they had worn the Samson engines so that they were beyond repair, or when it preferred to do so rather than make repairs on them, they of necessity became a part of the dredge as did the pump and the cables, etc."

Even if we had worn out the Samson engines, libelant's remedy would not be the passing to it of title to the Atlas engines, which belonged to neither of the parties, but the recovery by libelant of the value that the Samson engines would have had if we had not worn them out, but had subjected them to ordinary wear and tear only. This relief could not be given in this case, since no such damages are pleaded, nor is there any testimony on that subject.

But libelant's argument fails for the further reason that it is not supported by the evidence. The testimony relied upon by libelant in support of its claim that we wore out the Samson engines is that of Mr. Musladin, who made an examination of the engines in October, 1910, about six weeks after the libel was filed, and reported as his opinion, that the engines were worthless and not worth the cost of repairs. This opinion is wholly valueless, for the reason that it is in conflict with the uncontradicted

facts that the engines were subsequently repaired and put into good running order. Knight says (p. 347) that, "at all times the engines were kept in as good condition as they could be kept"; that they did as good work at Alameda (our last use of the Samson engines) as they had ever done while in our possession (p. 389); and by the testimony of Morrison (pp. 520 to 525) and Barker (pp. 586-591) we have shown, without contradiction, that when the time came for us to replace these Samson engines on the dredger, we thoroughly overhauled them again, made all such repairs as were necessary, and put them into good working order and condition. Libelant offered no testimony whatever to refute this evidence on our part; in fact, according to the testimony of Mr. Cutting, the president of libelant, no examination or inquiry was made as to the condition of the dredger or the engines at any time after the Musladin examination.

The strongest confirmation of Knight's testimony, that the engines were still doing good work at the end of our use of them, is the comparison of output of the dredger during the last week of the use of the Samson engines and the first week of the use of the motor, at Eureka. The material encountered during the two weeks of dredging was of the same character. The indicated horse power of the two Samson engines taken together was 150 HP. The indicated horse power of the electric motor at Eureka was 200 HP. The output of the dredger

with the Samson engines in operation was 10,293 cubic yards for the week, and the output for the first week with the motor was 15,047 cubic yards. During the last week with the Samson engines, their actual running time was 126 hours, or an average of 18 hours a day, after deducting all stops of the dredger for all purposes. During the first week with the motor the actual running time was 138 hours 45 minutes, after deducting all stops of the dredger for all purposes. The average output per hour with the engines during that last week was $81\frac{1}{2}$ cubic yards, and the average output with the motor during the first week of its use was 108 cubic yards an hour. Then taking the indicated horse power of the motor and of the Samson engines as a fair basis for computing the relative output to be expected from the two sources of power, it appears that the engines should have been able to give an output three-fourths as great as that of the motor, and that they did (Knight, pp. 439 et seq.). This testimony of Knight's was taken from daily reports made at the time.

To say that engines that were capable of performing, and did perform, such amount of work were "worn out" is nonsense.

Against all this direct and circumstantial evidence, libelant presents only the opinion of Mr. Musladin, a young man but twenty-five years of age at the time he made his examination, and whose tes-

timony in detail does not support his sweeping conclusion.

“The crank shafts were cut and scored on the bearings, and they had to be trued up to put them in shape.” (pp. 104-131.)

On cross-examination he says:

“These ‘cuts’ were about $1/32$ of an inch in depth.” (p. 113.)

“Two of the fly wheels were in good condition, two had been cracked and the hubs patched by shrinking bands on the hub.”

“Q. How deep was it?

A. I do not know; probably ran clear to the shaft. It would not have been necessary to shrink the bands on if it did not.

Q. Then you are judging the depth of the cracks because it had bands shrunk on it?

A. Yes, sir.”

(Cross-examination, p. 112.)

“The cylinders would have had to be rebored to make a good job; they could have been run the way they were, but would not give satisfaction.”

“As I said before, the cylinders were not in very bad shape and they were not in good shape, and there were two fly wheels that were in good condition.” (p. 107.)

“Q. How many cylinders were there on the two engines?

A. Three cylinders on each.

Q. How much would it have cost to have rebored these cylinders?

A. What do you mean, just reboring, or including the cost of cartage to the shop?

Q. Reboring.

A. Just the reboring, about \$50 or so.

Q. Did you examine all six of the cylinders?

A. We examined two on one of the engines and one on the other, if I remember correctly.

Q. Were they all in the same condition?

A. Yes, sir."

(Cross-examination, p. 113.)

We shall in the appendix point out somewhat in detail the testimony of our witnesses in contradiction of Mr. Musladin and his estimate. Proctor for the libelant made no effort to sustain Mr. Musladin, or contradict our witnesses by evidence in rebuttal. And in the brief in this court, while counsel makes some slighting commentaries upon the examination of the engines made by our witnesses immediately before they testified, they have nothing to say about the positive testimony of Morrison and Barker, who were the only witnesses called by either side that knew, or could testify to, the condition of those engines at the time the tender was made. Upon this point there is no conflict of the evidence—it is all one way.

THE ATLAS ENGINES DID NOT BELONG TO THE STANDARD AMERICAN DREDGING COMPANY, AND NO ACT OF THAT COMPANY COULD AFFECT THE TITLE OF THE OWNERS OF THE ENGINES.

We submit that we have shown conclusively that libelant would have had no right to the Atlas engines even if they had belonged to the Standard American Dredging Company. And under no possible theory of the case could libelant acquire title

to engines that the Standard American Dredging Company had hired from the other appellees and installed temporarily on the dredger. No action of the Standard American Dredging Company could have the effect of divesting the title of the Atlas Gas Engine Company and the California Reclamation Company to the engines owned by them respectively.

Hendy v. Dinkerhoff, 57 Cal. 3;

Jordan v. Myers, 126 *ibid.* 565.

These cases involve machinery affixed to real property, and hold that the title remains in the lessor of the machinery, notwithstanding an agreement by the lessee with the owner of the land that all fixtures, machinery, etc., should vest in the land owner. That being the rule, the cases involving fixtures to real property *a fortiori* it must be the rule here.

Counsel have cited some cases from other jurisdictions, to the effect that machinery affixed to mortgaged property goes under the mortgage, but those cases are not in point. These engines were hired by the Standard American Company from their owners in California; and the title to the engines must be governed by the law of California.

EFFECT OF THE ADMIRALTY STIPULATION.

Counsel for the appellant in their brief and in their oral argument lay great stress upon the lan-

guage of the admiralty stipulation given for the release of the dredger:

“and return the said dredger in the same condition in which it now is and in good repair, and shall pay all damages which may be sustained by reason of the detention of the said dredger”.

They appear to be of opinion that the giving of this stipulation obligated the respondent to return the dredger to the marshal, and that in any event the dredger when returned should be in the same condition in which it was at the time of the release, without reference to what the court should find as to the rights of the parties. And they also appear to be of opinion that the language in the stipulation, “and pay all damages”, etc., affected the measure of damages and entitled the respondent to recover damages which it could not have recovered for the mere detention of the dredge by the respondent after the expiration of the charter party.

These opinions are, we submit, based upon a radical misconception of the proper construction and effect of the stipulation.

A possessory action in admiralty is practically the same as replevin at common law or claim and delivery in the code states.

See

Benedict on Admiralty, 4th Ed., sec. 186
and cases there cited.

In an action of replevin or claim and delivery, the defendant in possession, and claiming the right to possession, is always allowed as a matter of right to give a forthcoming bond, conditioned for the return of the chattel or its value. In a possessory action in admiralty, we believe the rule to be that release on bond or stipulation is within the discretion of the court.

The Poconoket, 61 Fed. 106.

In this case the respondent appeared, claimed the right of possession as bailee, filed an affidavit of merits, and applied to the court for an order releasing the dredge on giving an admiralty stipulation, and the court granted the application.

A forthcoming bond always contains the condition, either expressed or implied, that the chattel shall be returned, "if it shall be adjudged that plaintiff is entitled to possession thereof", since the bond is merely security to the plaintiff for whatever judgment he may obtain. Without this implied condition, the bond would be without consideration and void to that extent.

In such a bond, the marshal or sheriff is a nominal party only; the plaintiff or libellant being the real party in interest. In this case, the order of release (pp. 17-18) provides that the bond should be "conditioned for the return of said dredge *to the owners thereof* in as good condition as it now is", etc. The bond itself (pp. 18-19) was conditioned for the "return of said dredger in the same condi-

tion in which it now is", etc. There is no provision in the order, nor in the bond, nor in the law, that the dredger should be returned to the marshal. Independently of the terms of the order, the rule is uniform that in replevin the losing party, whether plaintiff or defendant, who has taken the property under bond must return it to the prevailing party, and that such return is a satisfaction of the bond.

Douglas v. Douglas Admr., 21 Wall. 98; 22

L. Ed. 479;

Gans v. Woolfolk, 2 Mont. 458;

Capital Lumbering Co. v. Learned, 36 Ore. 544; 59 Pac. 454;

Berry v. Hoefner, 56 Me. 170.

And if in any manner, pending or subsequent to the replevin suit, the property comes into the hands of the obligee, it is a satisfaction of the replevin bond.

Rinker v. Johnson, 29 Neb. 783; 46 North-eastern 211;

Lewis v. McNeery, 38 Ore. 116; 62 Pac. 897.

The marshal was the agent of the plaintiff.

Douglas v. Douglas Admr., *supra*.

Having received the dredger from the libelant's agent, we made the tender to the principal—"to the owner thereof". And having voluntarily offered, during the pendency of the action to give to the plaintiff all that it could get by a judgment, there

was a perfect offer of performance and satisfaction of the bond.

Counsel's argument seems to be that the District Court, by its order fixing the terms of the bond, without having heard any evidence passed upon the title to the Atlas gas engines and decided that they belonged to the libelant. The mere statement of this proposition is sufficient for its refutation. The respondent being in possession of the dredger under a claim of right was deprived of that possession by the marshal on process without a hearing. The court ordered the vessel released to us on our giving a stipulation; and in giving that stipulation we and our surety became liable for that only which the law required, viz.: that we would return the dredger to the owner in its then condition, if the court should ultimately decide that the libelant was entitled to have it in that condition; and that we would pay such damages as the court should adjudge the owner had suffered by reason of the detention.

The absurdity of counsel's argument is manifest. In this case the District Court, after hearing the evidence, decided that the two Atlas gas engines, which were on the dredger at the time she was released to us by the marshal, did not belong to the libelant. Therefore, the judgment in the cause of action for possession was favorable to the respondent as to part of the property replevied. Yet counsel argue in effect that even though, as was found by the District Court, the Atlas engines did not be-

long to the libelant prior to the giving of the stipulation, the title passed to the libelant by virtue of the stipulation. If a forthcoming bond possesses such a power, it is difficult to conceive of its limitations. Suppose the ownership of the several parts of the dredger had been reversed; that we had owned all of the dredger except the engines and the appellant had libeled the dredger as a whole, and we had given a forthcoming bond such as we actually gave. If counsel's argument be sound, the title to the hull and other machinery of the dredger would, by virtue of the forthcoming bond, pass to the libelant.

We submit that his honor, Judge De Haven, covered the whole ground in a paragraph (pp. 1007-1008):

“I do not think the stipulation has the effect claimed for it by the libelant. This stipulation was only intended to secure to the libelant the benefit of the final decree of this Court, and cannot be construed as requiring the defendant dredging company to return the ‘Richmond No. 1’ equipped with the Atlas gas engines if the Court, in its final decree, should determine that these engines were not the property of the libelant.”

Counsel cite a number of cases to the effect that the losing party in replevin is bound to return the property in as good order as when he received it on giving his bond. We have read all of them and they seem to be good law; but they are not applicable to this case.

**THE DECREE OF THE DISTRICT COURT SHOULD BE MODIFIED
BY TAXING THE COSTS TO THE LIBELANT, AND ALLOWING
THE STANDARD AMERICAN DREDGING COMPANY FOR THE
SERVICES OF A CARETAKER AFTER THE TENDER.**

The hearing of an appeal in admiralty being a trial *de novo*, this court has authority to modify the decree favorably to the appellee, if the evidence warrants that action.

The San Rafael, 141 Fed. 270.

In this case we submit that the District Court erred in allowing costs to the libelant and in not allowing costs to the respondent.

If the court shall hold that this is not a case of admiralty jurisdiction, we are entitled to our costs, since the lack of jurisdiction does not appear by the averments of the libel, but is disclosed by the subsequent pleadings.

Lowe v. The Benjamin, 1 Wall. Jr. 187;

The City of Florence, 56 Fed. 236.

If our contention, that the Standard American Dredging Company was lawfully holding over under the terms of the charter party at the time the libel was filed, be sustained, then the action was brought prematurely; and even though in that case the decree for \$8600 should be affirmed on the ground that libelant's cause of action matured during the pendency of the action, yet the libelant must bear the costs.

The Pioneer, 53 Fed. 279;

Clark v. 505,000 feet of lumber, 65 Fed. 236;

The Papa, 46 Fed. 576.

And if the court shall hold that the decision of the District Court was correct in that the Standard American Dredging Company was bound to return the "Richmond" on recalling the "Oakland", and that the \$50 a day was in the nature of damages for holding over, yet we submit that the libelant should pay all the costs subsequently to the filing of the answers to the second amended libel and supplemental libel. The respondent had tendered the dredger and in its answer to the second amended libel and supplemental libel, averred the tender of the dredger, admitted its liability for \$50 a day up to the date of the tender, and in its prayer (p. 90) asked that, if the court should hold that the action was within the admiralty jurisdiction, judgment might be entered in favor of the libelant and against the respondent for the sum of \$8600, less keeper's fees and costs. After the filing of this answer, a trial was unnecessary. The question of jurisdiction was one of law, to be decided on the facts set forth in the libel and answer; and a simple motion for judgment on the pleadings would have afforded the libelant a decree such as was finally rendered for all that it was entitled to recover.

Instead of following this course, the libelant forced us to proceed to trial, which consumed a great deal of time, and resulted in a record aggregating 1071 pages.

Respondent's answer was a substantial compliance with section 997 of the Code of Civil Procedure. Independently of this section, we think this is

a case for the exercise of that broad discretion respecting costs which is possessed by courts of admiralty; and that not only should the respondent be relieved from payment of libelant's costs, but, on the other hand, the amount of respondent's costs should be deducted from the amount of the decree.

Benedict's Admiralty, 4th Ed., section 488
and cases there cited;

The Starke, 182 Fed. 498-501.

We think we are clearly entitled to an allowance for the expense of a caretaker on board the dredger during the time it was in our possession after the tender. When the libelant refused the tender of the dredge, the respondent became a depository for hire, and was, therefore, entitled to the reasonable cost of the care of the dredger.

Civil Code, secs. 1503, 1852.

**THE MOTIVES OF THE RESPECTIVE PARTIES AND THE
EQUITIES OF THE CASE AS DISCLOSED BY THE REC-
ORD.**

It is with reluctance that we enter upon the discussion of this question; and, if counsel in their brief and in their oral argument had been content to present the law and the evidence without attempting to strengthen their position by impugning the good faith of our client, we should gladly have followed their example. But in view of certain passages in the brief and certain remarks that fell

from counsel in his oral argument, we feel it our duty, not only to our client, but to ourselves as officers of this court, under whose advice our client acted, to point out to the court the baselessness of the charges and to show by the record that, if either party acted in bad faith, it was the libelant in attempting to use the process of the District Court to acquire the Atlas gas engines to which it had no shadow of title.

On page 26 of the brief, counsel say:

“But knowing that libelant needed the dredge, and had work to do, obtained possession of its dredger ‘Oakland’, without any intent on its part to return the ‘Richmond No. 1’, and thus prevent libelant from performing its City of Richmond contract, its action in so doing was fraudulent, oppressive and deceitful”, etc.

Again, on page 32,

“The Standard Company in this case went into court, used the court process and orders to obtain possession of property that it knew it had no right to, and having so used the process of the court, it was its duty to return the property as it took it from the court.”

And again, on the same page,

“It is very difficult to find language adequate to convey a proper meaning to the actions of the Standard Company in this case, or to point to an adjudicated authority where a party before the court and using its processes had the temerity to act as the Standard Company did in this case.”

On page 41, counsel say:

“But in either case having put them on it was likewise a violation of the terms of the admiralty stipulation, an act of bad faith with the court and a trespass to take them off again.”

In oral argument counsel said:

“Our contention and our belief is that this whole action of the Standard American Dredging Company is the action of one company trying to put another company out of business.”

Again,

“His Honor, Judge De Haven, held that although these parties went into court and acted in bad faith with the court, and in violation of the terms of the bond, and in violation of the common law of accession, the Standard American Dredging Company had the right to take those engines off although they were unquestionably a part of the dredger.”

In retaining the “Richmond” after the recall of the “Oakland” the respondent did nothing but what its officers and counsel believed and still believe it had a moral and legal right to do. The worst that could be said is that they misconstrued a contract that is “not a model of clearness”.

In applying for the release of the dredger on stipulation, the respondent not only acted in good faith, but pursued the only sensible, business-like course that was possible. It is to be borne in mind that the Atlas engines were on the dredger at the time she was seized by the marshal; that so far as those engines were concerned, the seizure was unlawful, because they did not belong to the libelant. The libelant, however, was claiming title to the engines, and the respondent clearly had the right to resist that claim. It was, therefore, necessary for the respondent to defend the action. In an action of claim and delivery, the sheriff makes delivery of the personal property to the plaintiff, unless the defendant gives a forthcoming bond within five days. But in a possessory action in admiralty, it is the duty of the marshal to retain possession of the vessel during the pendency of the action, unless the claimant secure its release on stipulation. Therefore, if respondent had not caused the release of the vessel, neither party would have had the use of it during the pendency of the suit, which respondent would have had to defend on account of the engines, even if it had been willing to waive its right to hold over under the charter party. If the respondent had followed this course, the result would have been that, during all the time required to conduct the litigation to judgment, the libelant would not only have been deprived of the use of its dredger, but would have received no rental for it. As the proctor for the libelant did

not get his libel into a condition satisfactory to himself until March 9, 1911 (one month and six days after we had tendered the dredger), it will be seen that, if the respondent had not bonded the dredger, the libelant would have been out of pocket \$8600.

We think that a reading of the testimony in this case will justify the inference that the prime motive of the libelant in instituting this action was to acquire the Atlas engines; and that its solicitude concerning its Richmond contracts is a pretense. In the pleadings and in the testimony, a strong effort is made to show the urgent necessity of the libelant to have a dredger to complete its work at Richmond, yet it is an undisputed fact that, when we made the demand for the "Oakland", the libelant, although it had the right to fifteen days' further use of her by the plain terms of the charter party, redelivered her to us within four days, and wrote us on August 16th (p. 796):

"Confirming our conversation of yesterday afternoon, we again wish to notify you that we have completed the work which we desired to do with the dredger 'Oakland', and that it is now in the canal at Richmond."

And on the same day libelant wrote another letter (p. 795):

"Again we notify you that we are through with the dredge, and that it is at your disposal and risk in the canal at Richmond."

By returning the dredger prior to the expiration of the notice, the libelant lost eleven days' work with a larger machine than the "Richmond".

It appears that on October 12th, libelant procured an extension of six months to perform its contract with the City of Richmond. On February 3, 1911, sixty-eight days before the expiration of that extension of time, the respondent, having re-installed the Samson engines and thoroughly put the dredger in order, tendered it to the libelant. The insincerity and bad faith of the libelant are shown right here. Instead of seizing upon this opportunity to go on with its work at Richmond, it did not even make an examination of the dredger to see if it was in good order, but stood upon the propositions that we must put back the Atlas engines, and that the tender should be to the marshal instead of to the owner of the property. We have shown that neither of these propositions has any foundation in law, and the second of them, even if it were sound legally, would have been a trifling technicality not affecting in the least the merits of the case. If there had been a trace of sincerity in libelant's claim, that it had great need for a dredger, it would have accepted the tender and proceeded to carry out its contract.

Another striking inconsistency, showing the insincerity of libelant's attack on our good faith, and charge of a wanton desire on our part to injure the libelant is shown by the testimony of Mr. Cutting, who, almost in the same breath with which he

recites the damage to his company by being deprived of its dredger to complete its contract at Richmond, claims that it was deprived of the same dredger at the same time for use on the work at Stockton. Again, he says that, if he had had this dredger "Richmond No. 1" in January, he would have bid on the Key Route Basin contract. How he could have escaped from his duties at Richmond to perform a contract at Stockton does not appear and is not important. What is important is that, when he had the opportunity to get his dredger in the condition required by the charter party, he refused to receive it.

In conclusion, we respectfully submit that, if the court shall find this to be a case within the admiralty jurisdiction, the decree of the District Court should be modified in the following particulars:

1. The costs of the action should be taxed to the libellant; and
2. Respondent should be allowed its counter-claim for the service of a caretaker of the dredger; and in all other respects the decree should be affirmed.

Dated, San Francisco,
March 21, 1913.

IRA S. LILLYCK,
JAMES S. SPILMAN,
Proctors for Appellees.

APPENDIX.

(References are to pages of Transcript.)

ATLAS ENGINES INSTALLED FOR TEMPORARY USE ONLY.

Perry.

We decided to remove the Richmond's engines and reinstall them again on completion of the Walnut Grove work, and deliver our return of the dredge as provided for at the place provided for in the charter party * * * (p. 766).

The Richmond Dredging Company's engines had been stored in a warehouse at Richmond, the intention being that they would be readily available when we were ready to reinstall them on the dredge Richmond upon the return of the dredge (p. 766).

In installing the two engines which we did on the Richmond No. 1, after having removed the engines which were originally on the dredger, we had no intention of having them for the dredger for any other than temporary use (pp. 806-807).

These engines were installed for the reason that we had a particular piece of work to do. * * * My intention of installing these engines was for the purpose of providing sufficient power to do the work at Walnut Grove then under contract (pp. 807-808).

The only intention that I had was to remove the engines on the completion of the work which

they were installed for, as it was special work, and that was all the work we expected to do with the dredge as far as we knew at that time which would require that power, and we only chartered the engines for this specific piece of work. When we put these two engines on board we expected to remove those engines after we finished this particular job. When we placed those engines on board of the dredger we did not intend to place them on the dredger in the way of repairs to the dredger (pp. 808-809).

(The witness, on page 810, then elaborates as to the manner in which the engines were attached to the dredger and their intention to remove the engines and return them to the parties from whom they were chartered.)

Knight.

We installed the Atlas engine because we were figuring on going to Walnut Grove (p. 368).

When we removed the Samson engines and installed the Atlas engines the character of the timbering work as to position upon the dredger was temporary (p. 436).

SAMSON ENGINES IN GOOD CONDITION WHEN TENDERED BACK.

Knight.

I think the Samson engines were in just as good a condition when we took them out as they were

when I took charge of the engines on May 1st, 1909, less reasonable wear and tear (p. 389).

It is pretty hard for me to say what parts of the old engines were replaced by new parts; exhaust valves when needed; springs; igniters; mica washers (p. 401).

Perry.

In January, 1911, the Samson engines were installed on the dredger in the same condition as they were as to working parts and actual connections with the dredger when we originally obtained it from the Richmond Dredging Company, I believe. I believe that the engines and the dredger itself were in the same condition in which it was when we received it, less reasonable wear and tear. I believe it was in as good order and condition as it was required to be by the terms of the lease which we had from the Richmond Dredging Company (p. 777).

Hannah.

I am the man who was sent down from the Samson Engine Works at Stockton to Oakland at the time the dredger Richmond No. 1 was being moved from the Estuary to Lake Merritt (p. 313).

The cylinders then were in very good condition. The engines at that time were in good condition. There were no cuts or scorings on the crank shafts. The pins were a little flat (p. 314).

From my examination of the engines made day before yesterday, and my knowledge of the condition of those engines after the repairing was done, before it commenced to work at Lake Merritt, there was no difference in their condition so far as I could see (p. 316).

(The witness then in detail states the portions of the engines that were in good condition.)

From the examination I made the other day the only opinion I can give is that they were in good condition (p. 332).

Morrison.

The United Iron Works people sent me in company with another employe of that firm to go and install two engines. We got to the dredger and found two Samson gas engines, which, under the direction of the engineer in charge, we were to put into working condition (p. 519).

I believe it was on Monday at noon time we commenced to work and we quit working the following Saturday at noon time. During which time there was the engineer and his assistant and two men from the United Iron Works, of which I was one (p. 519).

(Mr. Morrison then details the repair work done by him and concludes.)

After we had finished overhauling the engines they were started for a few moments and they shot in all six cylinders (p. 525).

I was sent as a mechanic to overhaul and install those engines and put them in a first-class condition, subject to the orders of the engineer in charge. When my work was completed after the engines had been run they were put in first-class condition to the best of my knowledge (p. 525).

Barker.

(Engineer in charge of dredge.) I was on the dredger from December 2nd until after the Samson engines were reinstalled on the dredger. There were four or five men working on the dredger during all that time. One was my fireman and there was the extra lever-man, who also was a carpenter, and the two lever-men (pp. 574-575).

My instructions were to get the engines ready as soon as possible; they had to go back to Richmond. (The witness here details repairs made on Samson engines, pp. 576, 577, 578, 579, 580 and 581.) After overhauling the engines I started them and ran them for about 5 or 6 or 8 minutes, maybe 10 minutes; they worked and shot in all six cylinders. The engines were in a satisfactory condition to run. On the way over to Richmond from Oakland I connected them with the pump to see whether it would work the pump. I tried the engines again at Richmond and they still ran (p. 576).

ENGINES GOOD WHEN TAKEN OFF AT ALAMEDA.

Knight.

During the time we worked the Samson engines at Alameda I think they were in as good condition as they were when we quit working with them at Eureka. They were in better condition than they were when we were doing the work at Lake Merritt (p. 343).

(On p. 344 the witness states what repairs were made to the engines to make them better.)

They were in working order at the time they were taken off at Alameda. We worked them right up to the time we installed the Atlas engines. The object of taking the Samson engines off was to make room to put another Atlas engine on, to put two Atlas engines in her (p. 345).

They were in the same condition when I finished using them as they were when I commenced to use them less ordinary wear (p. 351).

I think the Samson engines were in just as good a condition when we took them out as they were when I took charge of the engines on May 1st, 1909, less reasonable wear and tear (p. 389).

The repairs after the Eureka job put the Samson engines in good condition (p. 389).

From my examination made the other day the engines looked to be in better condition now than when I first saw them (pp. 353 and 412).

Perry.

The Samson engines are as able to do the work now as when we chartered her in 1909 (p. 934).

Betts.

(Libellant's own witness.) The Samson engines were running better at the commencement of the work at the Lake Merritt job than at the end of the work over at San Rafael (p. 172).

ENGINES NOT TAKEN OFF BECAUSE WORN OUT.

Knight.

The engines were taken off because we did not have power enough; they were in working order at the time that they were taken off at Alameda; we worked with them right up to the time we took them off in Alameda (p. 345).

I suggested taking off the Samson engines in order to get more horse-power. I never stated that they were worn out and they were not worn out. When I last used them in Alameda they were developing 120 h. p. (pp. 355-356).

We installed the Atlas engine because we were figuring on going to Walnut Grove (pp. 367-368).

The engines were taken out because we did not have power enough to run the dredger for the Walnut Grove job. The Atlas gas engine is a far better engine. We got more engine hours out of it, or more running time; in other words, the difference

between the material that was displaced in Alameda is not as favorable as the material displaced in Lake Merritt (pp. 384-385).

DREDGER BEING REPAIRED FROM DEC. 2ND, 1910, TO
FEBRUARY 3RD, 1911.

Perry.

From Dec. 2nd, 1910, we were repairing the dredger Richmond No. 1 before getting ready to turn her back to the Richmond Dredging Company. The men were never discharged entirely from Walnut Grove until we turned her back. We kept men aboard of the dredger all the time, from the time we finished at Walnut Grove until the time we delivered her at Richmond Canal Company's property at Richmond, Cal. I do not know how many men were kept aboard of her. General repairs were being made by those men; they were machinists and carpenters, dredge men (p. 948).

There were more than three men. We did not do any work with her subsequent to Dec. 2d, 1910 (p. 949).

We were repairing the dredger after Dec. 2nd, 1910, until the dredge was returned (p. 953).

I know the repairs were made because I have seen the bills and pay-rolls for doing it, and was on the dredge after Dec. 2nd, 1910, when she was lying near the Atlas Gas Engine Works in the Oakland Estuary. We had a big gang of men there,

3 or 4. I told Knight to repair the dredger and put her in shape to return (p. 953).

Those repairs were made on the gas engines during December and January (p. 956).

Barker.

I think there were somewhere around 4 or 5 men working on the dredger from the 2nd of December to the date when the Samson engines were reinstalled. One of them was a fireman, my fireman, and the others were the extra lever-man, who was a carpenter also, and the two lever-men (p. 575).

My instructions were to get the engines reinstalled and ready as soon as possible; they had to go back to Richmond. My instructions were to get the engines in good running order. (The witness then states that he took the cylinder heads off the cranks, crank brasses and connecting rods) (p. 576).

That he reinstalled the Wink's engine on the launch Wink and while they were coming down from Walnut Grove, were getting the other engine ready to take out and turn it to the Atlas people, and the details of what was done, stating that there were 5 men working on the dredger; that they took off the valve chambers and put in new gaskets and ground the valves. That new gaskets were put in (p. 577).

That the cylinders were in good condition; that he took off the cylinder heads and the gaskets on them were repaired and red-leaded. That at that time he looked at the cylinder walls and they were in fine shape and that it was not necessary to rebore them. That they cleaned the spark plugs, put in new insulation and put new gaskets around them; that the caps were taken off the bearings of the crank shafts and that the crank shafts were in first-class condition (pp. 578-579).

That the brasses on the connecting rods were all good and that they needed a little taking up and that they were taken up; that the crank pins were examined and they were in good condition. That he took off the cylinder heads and went over the cylinder heads with fine emory cloth and took out the pistons and saw that nothing was wrong with them and put them in again; that he looked at the fly wheels and they were in good condition; that there were no cracks in the hubs of the fly wheels; that he went over the exhaust pipes, put in a couple of new parts and rethreaded some of the pipe (pp. 579-580).

That he put a new lever on the clutch and put on new pipe in the circulating pipe and finally that after a general overhauling of the engines he started them and ran them for about 5 or 6 or 8 minutes, as long as he dared without getting too hot without circulating water in them and that they worked and shot in all six cylinders. That from

his experience as an engineer the engines were in a satisfactory condition to run and that after that at Richmond and when the dredger arrived, he started the engines again after having connected them up to the pump by hooking up the belt and they ran and shot on all six cylinders (pp. 580-581).

Morrison.

Morrison repeated practically what Barker had stated about repairs on the Samson engines, stating that he with another employe of the firm, the United Iron Works, went to the dredger and worked under the direction of the engineer in charge from Monday at noon to Saturday of that week at noon, overhauling and repairing the engines. Mr. Morrison goes into the matter in great detail and from p. 520 to p. 527 states what he did and concludes that the engines were put in first-class condition, with nothing left to be done upon them in any way.

REASON WHY SAMSON ENGINES NOT USED WITH ATLAS ENGINES.

Knight.

The company wanted me to use the Atlas engine in connection with the Samson engines but I told them I did not think it would be advisable because the engines are of different make, different speed, and I told either Mr. Perry, or some one in the company, that it would figure their heads off to get

the right size of pulleys to put on the pump shaft (p. 369).

The Standard American Dredging Company wanted me to run the Atlas gas engines and the two Samson engines in one unit for that Walnut Grove job, which I advised them out of (p. 372).

It was the intention of the Standard American Dredging Company to run the one Atlas engine and the two Samson engines in unit to drive that pump. I advised them not to do so, because the engines were of a different type, a different make, a different speed, I could not very well run them in one unit. If I had obeyed orders and did as they wanted me to do we would have used the three engines on the Alameda job, which would have increased our output. I did not do that because I was afraid of breaking the shaft of the Samson engines. I attempted to do that, but after I got the Atlas engine installed, ready to connect them up finally, they consented to finish that job with the one engine and for me to take the Samson engines out and put in the foundation for the Atlas engine and finish that Alameda job with the one engine, and when we got to Walnut Grove to take the engine out of the launch Wink and put that on there. * * * After we got the Atlas engine going we simply took out the Samson engines. There was no use switching back after we had the Atlas engine installed temporarily, because we were running better than we would with the Samson engines. It was a far

better engine and cost 25 to 30 per cent more money (pp. 386-387-388).

CONTRADICTION OF MUSLADIN'S TESTIMONY.

It will be remembered that Mr. Musladin testified that there were rocker-arms on the engines, cracks in the wheels, cams completely worn out, cylinders not in very good or in very bad condition and that the engines were not worth repairing.

Within the brief statement which we desire to make in this appendix to our brief, it is hardly possible to show the complete contradiction of Mr. Musladin's testimony by that of the witnesses introduced by us without quoting the testimony in full. But the following witnesses testified that there were no rocker-arms on the engines and never had been any:

Harding, pp. 252-262;

Hannah, p. 319;

Knight, p. 356;

Morrison, p. 561.

The following witnesses testified that although they examined the wheels for cracks in them, there were none:

Harding, p. 258;

Hannah, p. 317;

Knight, p. 354;

Morrison, p. 552;

Barker, pp. 591-580.

The following witnesses testified that the cams were in perfect condition:

Harding, p. 262;

Hannah, p. 317.

The following witnesses testified that the cylinders were in good condition:

Knight, p. 351;

Hannah, p. 314;

Barker, p. 578;

Morrison, p. 522.

And Mr. Morrison testified "I calipered the cylinders to see what condition they were in with the anticipation of probably having the job for the firm I was working for to bore them out. They were in such a good condition that we could not get a job for our firm. They were pronounced in first-class condition" (p. 522).

It will be remembered that Musladin testified that the fly wheels were cracked. The best answer that could be made to this contention to show its falsity is that of Mr. Morrison that he would never have been on the dredge if there had been any cracks on the fly wheels on account of the danger of the fly wheel breaking from its motion (p. 524).

RICHMOND DREDGING COMPANY MADE NO EXAMINATION OF DREDGER OR ENGINES WHEN TENDERED IN FEBRUARY, 1911, NOR ANY OBJECTION TO OFFER.

Cutting.

When the Standard American Dredging Company tendered us the dredger on February 3rd and again on February 6th, 1911, I did not look over the dredger at all. I did not see the dredger for quite awhile after that. I did not have any one from my office (p. 243) or any one acting under instructions from us examine the dredger or equipment on February 3rd or February 6th, or on any date near that date. I did not because I understood from Mr. Perry himself that they had taken off those new engines and put back the old worn out ones, and I told him at the time he talked about delivering the dredger to us, I said "You did not get the dredger from us; you got it from the court; you had better deliver it to the United States marshal." I do not think I made any objection to the offer. I did not write any letters, and I did not see anybody afterwards, but of course I knew from my examination of those engines that they were worthless, and that they would not run the dredger, and the charter party provides that it shall be turned back to us in condition to immediately commence work. My knowledge of the fact that those engines were on there told me that she was not

delivered any way according to the charter party, and my understanding all the time was that the dredger must be delivered back to the court, because that is what the bond called for and in the condition she was at the time the bond was given (p. 244).

(Later the witness states, on p. 245, that he remembers that a letter was written from their office in answer to the letters tendering the dredger but the letter witness remembers was not introduced in evidence.)

EFFECT OF CUT 1-32ND OF AN INCH IN DEPTH IN CRANK SHAFT.

Barker.

Cut or score of 1-32nd of an inch in depth on crank shaft would not injure the engine any; not providing it had a little crease on the outside, a sharp crease, a little bur—that is what I was trying to say, a little bur, on the outside, would not hurt if it was an eighth of an inch deep (p. 581).

Morrison.

Q. What in your opinion, speaking from your experience as a gas engine man, Mr. Morrison, would be the effect of a cut or score of 1-32nd of an inch in depth on the crank shaft? A. Such a score as that would not cut any figure with any crank shaft, or any bearing whatever. It is a matter that can be found in almost any engine.

Q. Would you say that the crank shaft would be seriously impaired by reason of a cut of that depth? A. It would not affect the crank shaft practically to any extent, no more than it might convey to the eye of a novice that something was wrong. To a practical man it would not convey anything'' (pp. 523-524).

Betts.

(After testifying on p. 196 that a cut 1-32nd of an inch in depth would affect the crank shaft said, on p. 197): "I should consider that it would weaken the crank shaft just that much. If the crank shaft is, to say, for instance, 5 inches in diameter, and it takes 10,000 pounds of breaking test to break it, if you reduce the size of the shaft 1-32nd of an inch it reduces the strength of it that much. That is the only thing I can say" (p. 197).

EFFECT ON GAS ENGINES OF "OVERLOADING".

Perry.

I doubt if you can get more horse power than they (gas engines) are designed for. You cannot increase the charge pressure like you could with a steam engine; for instance, if you are using steam on an engine wherein the engine is (p. 775) designed to carry 100 lbs. of steam, and you have a boiler that is safe to carry 200 lbs. of steam and raise the pressure for instance to 200 lbs., and deliver it to the engine designed to carry 100 lbs. you

might expect to do some damage. In the case of a gas engine you cannot materially raise the pressure by any means and the volume that the cylinders may take in can only be increased a nominal amount which the engine is tested for, when it is on the test stand in the shop, at which time the engine is given the highest rating that is ever possible to get out of her because the conditions of the gas engine at that time are as good mechanically as they ever are afterwards, or better, due to the fact that all parts are tight and well fitted. I think a gas engine cannot be damaged by attempting to get more power out of her if she is intelligently handled. I mean, if the circulating water is kept going around the cylinders, and other parts taken care of, the same as you would in a steam engine; for instance, if you allow the water to become too low in your boiler you would blow the engine up. That is what I mean by intelligently handling the engine. By handling an engine intelligently with a competent engineer, I think there is no possible way in which you can damage the engine by attempting to obtain additional power out of her (p. 776).

(On cross-examination the witness testified):

The result of an attempt to get more power from the engine than it can reasonably produce is that it would not produce it (p. 909).

They won't develop any more power than they are built to carry. If you put load enough, you

can put on load enough to stop any engine from revolving. I don't know whether it will "thump" before it stops revolving or not; it will not shake the machinery, it will just stop. (The witness then explains why it will not damage the engine and continues.) You cannot overload a gas engine between the point of what she is designed to carry (p. 910); that will cause her to stop; there is no injury done in between those points. We test them on the stand with a brake horse power and pull them right down to a stop on a scale. There is not a particle of damage done to the engine. (The witness then explains what a brake test is on an engine to show that an engine cannot be damaged by attempting to get more power out of it than its rated horse power) (p. 911).

Harding.

Q. Assuming that the gas engine is constructed and rated as a 75 horse power engine, what would be the effect on that engine of attempting to put a load upon it of 100 horse power, temporarily? A. Well, if the engine was constructed and could not possibly give any more you could not get any more; that is, if you tried to get more power, your engine would simply slow down and stop (p. 262).

Knight.

Q. What is the effect of overloading an engine upon the engine itself? A. In this particular case? Q. In this particular case? A. We just

reduce the speed and develop less power than they were built for. Q. Did I understand you to make a distinction between running an engine at a greater speed than it is built for and overloading it by attempting to get more work out of it? A. If you overload an engine by attempting to get more power out of it you have got to run it faster than it is built for, which is a detriment to the engine; but if you overload it and decrease the horse power it is not hurting the engine at all; in fact, it is helping them out. (The witness continues.) We did not during any portion of the time we worked at Lake Merritt, Eureka or Alameda overload the engines by attempting to run them at a higher rate of speed than the engines were built for. It was not possible to run those engines so that they would damage themselves by having too much pressure put upon them because you simply decrease the speed and by so doing you decrease the horse power (pp. 348-349).

No. 2208.

IN THE

United States Circuit Court of Appeals

FOR THE NINTH CIRCUIT

RICHMOND DREDGING COMPANY
(a Corporation),

Appellant,

vs.

STANDARD AMERICAN DREDG-
ING COMPANY (a Corporation), et
al.,

Appellees.

APPELLANT'S REPLY BRIEF.

It is true that the order for the release of the vessel read "conditioned for the return of said dredge *to the owners*"; but the bond itself says nothing about *owners*, it simply provides for "*a return, in the same condition,*" etc.; a surety has a right to stand on the strict letter of his obligation, and as the bond does not say to whom it shall be returned, the surety would, we think, have the right to claim that it should be returned to the possession of the party in whose possession it was at the time he became such surety, but we think that point not of very great importance.

If there are any errors in the statement of facts in appellant's brief, such errors are due entirely to the fact that the writer was not present at the trial of the case, and he did the best he could in arriving at the facts shown in the voluminous testimony in this case.

It was an error to state that the Standard American Dredging Company did work at San Rafael with the Richmond No. 1; however, it appears that the difference between that company and the California Reclamation Company, who did do it, is in name only; its officers and directors appear to be the same; W. L. Paulson verified the answer of the latter corporation as a director and assistant secretary, and he also verified one of the answers of the Standard American Dredging Company as a director of that company. (Pages 96-99.) Claude Cummings was the vice-president of both companies; Mr. Perry was the president of both companies, and Cummings thought that Mr. Connor was the secretary of both companies. (Pages 512-513.)

I.

JURISDICTION.

The case of *The Blackheath*, 195 U. S. 361, was a case where a vessel injured a beacon set on piles that were firmly affixed to and driven into the ground, but surrounded with navigable water, and the United States Supreme Court held it was a case of admiralty jurisdiction; the case of *Cleveland T. Ry. Co. vs. Cleveland Steamship Co.*, 208 U. S. 316, and *Duluth & S. B. Co. vs. The Troy*, *Ibid.*, both cited in appel-

lees' brief, were cases where a shed or wharf was injured, hence the distinction.

This Honorable Court held in the case of *North American Dredging Co. vs. Pacific Mail S. S. Co.*, 185 Fed. 698-702, as stated in appellees' brief, and counsel has italicized the following language:

"when employed as an aid to commerce in deepening navigable channels and harbors."

This dredge was certainly so employed when deepening San Rafael Creek, by the California Reclamation Company. (Pages 1036-1051.) And it certainly could make no difference whether she is deepening by design, or incidentally; she was deepening Lake Merritt, a part of the time, and at the time the final contract between the parties in question herein was entered into, she was in Eureka, Humboldt County, and had to be towed for a distance of about or a little more than 200 miles out on the open ocean to return for delivery under the contract; she was certainly subject to admiralty jurisdiction while on the way here, and while being moved around the waters of the Bay of San Francisco and its tributaries, and while performing the work for the Southern Pacific Company at Walnut Grove; she was incidentally deepening the channel there to some extent, at any rate the dredge was just as much surrounded by navigable water when so dredging as was the beacon in the "Blackheath case," and had the additional element of admiralty jurisdiction attached to her as an entity, that of being afloat, and operating afloat.

The work at Richmond was in tidal water canal. The Sacramento River and San Rafael Creek are navigable waters. (Sec. 2349, Cal. Pol. Code.)

We respectfully call the Court's attention to the case of *Charles Barnes vs. One Dredge*, 169 Fed. 895, cited approvingly by this Court in *North American Dredging Co. vs. Pacific Mail S. S. Co.*, above mentioned.

II.

STANDARD AMERICAN DREDGING COMPANY WAS NOT HOLDING UNDER AN ALTERNATIVE AGREEMENT.

It is true that under section 9 of the contract the Standard American Dredging Company had a right under certain circumstances to require the "Oakland" to be worked twenty-four hours per day, or it had the right "to terminate the lease of the said dredger 'Oakland' " by giving the party of the second part fifteen days' notice of such termination, *and* returning the dredger "Richmond No. 1"; that language is in the conjunctive; under it the right to the "Oakland" depended on the return of the "Richmond No. 1"; then appears the language:

"Or paying the party of the first part at the rate of \$50 a day for the said 'Richmond No. 1', for all time it shall be retained by the party of the first part after the expiration of said fifteen days' notice, and the return of the 'Oakland' to the party of the first part."

We tried to make ourselves clear in our brief; we intended to say that the contract must be taken as a

whole; that the \$50 per day clause above mentioned could only apply to the case where the Standard American Dredging Company demanded the return of the "Oakland", and at the same time asked and received permission to retain possession of the dredger "Richmond No. 1", it could not apply to the case where the Richmond Dredging Company required the dredger under the provisions of section 10, as the Standard American Dredging Company would then have no right to its possession at all, and having no right to possession, of course there could not be any stated rent, or any rent at all.

No stipulated rent can apply to a case where the party agreeing to pay the rent had no right of possession; rent follows contractual use, and contractual use always depends on the consent of the owner; there could not be any contractual rent when there was no contractual possession, and there could be no contractual possession when one party holds another's property against his will, and without any contractual right, and contractual right of possession in the Standard American Dredging Company ended here when the Richmond Company required the use of the "Richmond No. 1". The rejected drafts and conversations are immaterial in this case, and why so much testimony was introduced to prove the understanding of the different witnesses on the meaning of the charter party of February 26th, 1910, it is difficult to understand; the charter party is not ambiguous; if the appellant required the use of the dredger "Richmond No. 1" it was entitled to it after or concurrent with

the return of the "Oakland", and appellant unquestionably required its use; it had a contract, in fact two, to perform with it, and the Standard American Dredging Company knew it, and there seems to be no room for further discussion on that point.

See testimony of H. W. Wernse (pp. 142-144) as to reason why the 400,000 cubic yards was mentioned in charter party and testimony of H. C. Cutting (p. 211) and H. W. Wernse (pp. 138, 141 to 147).

We fail to see the application to this case of the authorities cited on pages 15 and 16 of appellees' brief; they might apply if this contract had not ended August 15th, 1910. There was no provision for holding over in the charter party in this case; the Standard American Dredging Company had a right to possession only so long as the Richmond Dredging Company did not require the "Richmond No. 1", and no longer; holding over is in all cases a contractual right; if not given by contract there is no right of holding over, except such as may be implied by law.

III.

We do not agree with the reasoning of counsel that appellant was limited to the \$50 per day; that would possibly be accepted by the Court as the stipulated value for the mere use of the dredger alone, but if other damages have followed and were claimed, as they were in this case, that is not the limit of the measure of appellant's rights.

Counsel are also in error when they say libellant

sued on the contract; the gist of the action is found in paragraph IV of the second amended libel (pp. 26-28); it contains in substance the usual allegations in an action of replevin; there is a great deal of redundant matter included, but the nature of the action is not changed.

The first count of the supplemental libel is based upon the bond given to the Marshal.

The second count, (to which exceptions were sustained), sounds in tort.

The third count also sounds in tort.

And the fourth count (to which exceptions were also sustained) (pp. 43-45), also is in tort.

To carry out their reasoning that \$50 per day is the measure, counsel have to construe the charter party as giving a right to hold over, when as we have shown, there was no right of holding over given if the appellant required the dredge.

We may concede that if the Standard American Dredging Company had returned the dredge when it took the "Oakland", and the appellant had finished its contract at Point Richmond, that the language "when not in use" might have given the Standard American Dredging Company the right to the use of the dredger up to January 1st, 1911, provided it was *not required* by appellant, but that contingency does not arise here, for the reason that appellant was not given an opportunity to use the dredge, so the language

"or required by the party of the second part" is the controlling language.

In no event, whether the dredge was required by appellant or not, the Standard American Dredging Company could not keep the dredge after January 1st, 1911; no excuse has been offered for not tendering it back on that day or for keeping it until February 3rd, without a tender; that of itself shows bad faith.

But no possible excuse can be offered for holding the dredge after January 1st, under any construction of the charter party. Appellant was entitled to it on that day, still the Standard Company kept it, another party's property, depriving it of doing business until it completed its contract, and counsel lay great stress upon the fact that it was not accepted February 3rd, 1911. The lower Court held, page 1007:

"The law requires that a party injured by a breach of contract must make reasonable exertions to render the injury as light as possible, and he cannot recover for any loss which might have been avoided with ordinary care and reasonable expense."

There is no doubt that this was not a breach of contract after the right of possession vested in appellant, it became a tort, a wrong, from the commencement, and without any ground for contrary argument a wrong after January 1st, 1911. The law upon the subject is shown in the following language.

Kissam vs. Anderson, 145 U. S. 435.

Pages 441-442:

"It is settled by abundant authority that where

one has taken the property of another, damages are not mitigated by showing merely that the wrongdoer returned the property without the consent of the owner, or applied it upon the owner's debts. It must appear still further that the owner consented to such action or that the proceeds were so applied under legal process without the connivance of the wrongdoer."

McAfee et al. vs. Crawford, 13 How. 446.

The above decisions completely dispose of the claimed tender. We stated in our opening brief that this case was tried and decided on an erroneous theory, to wit: upon the theory that it was a breach of contract.

The law has always given a person who is deprived of the possession of property the privilege of at least two remedies, to wit: one trover or conversion, the other replevin.

The appellant would have had the right to sue in trover, or conversion, and the findings of the Court in this case would have sustained an action for the value of the dredge in conversion, or it could do as it did, sue in replevin.

Neither the action of conversion, or repleving can be maintained until all contractual relations with respect to the property are ended and the party in possession of the property becomes a tortfeasor. It matters not whether he defends the action and files a bond for the return of the property or not, his possession is not that of a bailee, nor is his position in

relation to the property altered. He is still wrongfully in possession.

The courts have found it necessary to allow defendants to give bonds, and no case can be found where the bond read that it was to be returned in the same condition, that it was held that a return in a different condition, satisfied the bond, where such bonds simply required the defendant to return the property saying nothing about condition. It is the law that the return satisfies the bond but the owner has a remedy in an action not upon the bond for the damage.

We find in this case that a bond was given. Under order of the Court requiring defendant to pay all damages that might be sustained by libellant, and then libellant was by, as we believe, an error of the Court in striking out his pleadings in which it claimed damages, deprived of that particular right afforded him by the bond, viz.: proving the damages it had sustained.

Dredges are not like things in common every day use. They cannot be picked up at a day's notice, like an express wagon. One dredge may be suitable for a certain kind of work, and no other of the few dredges in and around San Francisco might be suitable. They are costly to build and necessarily limited in number.

In replevin a party is not limited to rental use, as was said by C. J. Bovill in the case of *Gibbs vs. Cruikshank*, 8 Law Rep. C. P. 454.

"When the goods were not redelivered by the sheriff, according to the books, it would appear

that the plaintiff could recover the full amount of the damage that he had sustained. * * * I see no reason in principle why there should be any limitation as to the amount of the damages recoverable in such a case; I do not know any ground in law for confining the damages to the amount of the expenses of the replevin bond; in practice, these expenses are all that are recovered, merely because there is generally no other damage. * * * Whatever damages have been actually sustained may be recovered."

As we understand the common law, when a party brought an action of replevin, gave a bond and obtained possession of the goods forthwith, the only damage recoverable was the expenses of the replevin bond; but if the defendant under a statute allowing him so to do, bonded against delivery, then the plaintiff could recover such damages as he actually sustained by reason of the detention of the goods on the detinet theory.

Scattergood vs. Wood, 14 Hun. 269;

Zitshe vs. Goldberg, 38 Wis. 216;

Arzaga vs. Villaba, 85 Cal. 191;

Hickey vs. Cochina, 133 Cal. 81.

Section 3281 of the Civil Code of the State of California provides:

"Every person who suffers detriment from the unlawful act or omission of another may recover from the person in fault a compensation therefor in money, which is called damages."

Section 3282 provides:

"Detriment is a loss or harm suffered in person or property."

Section 3283 provides:

"Damages may be awarded, in a judicial proceeding, for detriment resulting after the commencement thereof, or certain to result in the future."

Section 3294 provides:

"In an action for the breach of an obligation not arising from contract, where the defendant has been guilty of oppression, fraud, or malice, express or implied, the plaintiff, *in addition to the actual damages may recover damages for the sake of example and by way of punishing the defendant.*"

In 117 Cal., in the case of *Hicks vs. Drew*, page 305, in the opinion, commencing with the bottom line of page 311, it is said:

"The trial judge instructed the jury as follows: 'No damage can be recovered in this action for injury to plaintiff's feelings, but only such pecuniary damage as accrued to her property by reason of the maintenance by defendant of a bulkhead at the foot of California street, and of such damage she can recover only so much as accrued to her before the commencement of this suit and after the twenty-ninth day of November, 1891.' Section 3283 of the Civil Code provides: 'Damages may be awarded in a

judicial proceeding for detriment resulting after the commencement thereof.' By this section of the code, plaintiff was entitled to recover damages suffered subsequent to the filing of the complaint, and for this reason the instruction given is unsound as a proposition of law. Neither was a supplemental pleading necessary to support such a recovery. This court said in *McLennan v. Ohmen*, 75 Cal. 558: 'Besides, plaintiff was entitled, under his original complaint, to recover damages for detriment resulting after the commencement of his action.' In line with the legal principle declared by the aforesaid section of the code, see *Morgan v. Reynolds*, 1 Mont. 163; Greenleaf on Evidence, sec. 268a."

In the case of *Martin vs. Southern Pacific Co.*, in a damage suit, 130 Cal. page 285, at page 287, it is said:

"The character of the injuries sustained by her, as well as their probable duration and the professional care required for their alleviation, were proper subjects for the opinion of experts. The plaintiff was entitled to recover for whatever damage could be shown as certain to result in the future (Civ. Code, sec. 3283); and the testimony of the physicians who had attended upon her was a proper mode of establishing this fact."

I consider under these authorities that appellant was entitled to recover for all damages he actually sustained up to the time of the entry of the decree in this case, and hence Judge De Haven committed error in striking out the claims of appellant for damages.

IV.

The letter of demand of the dredger, a quotation from which is found on pages 20 and 21 of brief, only applies to the use of the dredger; it says:

“that Richmond Dredging Company will claim fifty (\$50.00) dollars per day for *the use* of said dredger * * *

That letter could not in any event be held as a waiver of damages that had not then accrued, and which the Richmond Dredging Company had no idea ever would accrue at that time; the damages claimed in the second and fourth claims of damages in the supplemental libel were sustained after the giving of the bond, and correspond to the action of detinet at common law; the fact that libellant filed a libel the day after the letter was sent shows it did not continue or intend to continue the charter party.

V.

Replying to that part of appellees' brief relating to the Atlas engines, we beg to state that whatever may be the law in some States, the decisions of the United States Supreme Court, and the various United States Circuit Courts of Appeal upon the subject, is as follows, and best expressed in the following language in

Phoenix Iron Works vs. N. Y. & To. Co.,
28 C. C. A. 76:

Page 79:

“When a necessary part of a permanent origi-

nal construction work is put in and becomes a part of the plant or system, such as stationary boilers, engines, rails, section of bridge work, and the like, it loses its previous character as separate moveable property, and becomes subject to a mortgage properly conveying the entire thing of which such engines and boilers become a permanent part."

The United States Supreme Court and the Circuit Court of Appeals have further held that when one party affixed his property, or expended labor upon another's goods, without any right, that the improved property became the property of the party whose goods had been so improved, or to which such additions had been made.

Wooden Ware Co. vs. United States, 106 U. S. 432;

Durant Mining Co. vs. Perez Consolidated Mining Co., 94 Fed. 106;

Golden Reward Co. vs. Buxton Mining Co., 97 *Id.* 413.

We still insist that no hirer of either real or personal property has any right to change the construction of the hired property without the consent of the owner, and when he does so he is a wrongdoer; this leads us to another question. The law is that when a party sues in conversion, his damages ordinarily are the value of the property at the time of the conversion.

In replevin the law is that he is entitled to the

property as it is at the time of the replevin; the following language best expresses the rule:

Claspy vs. Cabot, 135 Mass. 435.

In that case a schooner went ashore, the master believed he had the right to sell her, and sold her; the purchaser improved the vessel, and she passed into other hands; the owner at the time she was wrecked commenced an action in trover, claiming the master had no right to sell her at the time he did; the decision was to the effect that the sale was wrongful and that if he had sued in replevin the original owner would have been entitled to possession with the improvements, but suing in conversion, he was simply entitled to her value when the master sold her.

It is said at page 439:

"Cabot converted to his own use the hull when he purchased it in Boston, and took possession of and used it as his own; the changes in the hull, whereby its value had been increased, which had been made by Murphy after he had purchased the schooner then lying on Coffin's Beach, *were not made at the request of the plaintiff*, and if the plaintiff had retaken or replevined the schooner from Murphy in Boston, he would have received her in the condition she was then in."

Page 440:

"In replevin any improvements of the property attach to and go with the property replevied."

One of the best considered cases upon this subject is

Suydam vs. Jenkins, 3 Sandf. 614.

In that case the Court, speaking through Judge Duer, says, on page 644:

“The undertaking of the plaintiff in the replevin bond, we conceive, is absolute to return the goods, or pay their value at the time of the execution of the bond. We cannot think that a wrongdoer is ever to be treated as a mere bailee, and that the property in his possession is to any extent at the risk of the owner. We have seen that the defendant in trover or trespass is in all cases responsible for the value of the property when taken or converted, and certainly it has never been supposed he can discharge himself from this responsibility, in whole or in part, by showing that the property had been destroyed or injured by an inevitable accident, after he had obtained its possession. A plaintiff who, without right or title, has seized the property of another by a writ of replevin is as much a wrongdoer as a defendant in trover. No reason can be given why his liability should be less extensive, and in fact when the replevin suit is terminated, although he cannot be treated as a trespasser, he may be sued in trover at the election of the defendant.”

Cal. Code Civ. Proc., secs. 627, 667.

VI.

It makes no difference whether the Atlas engines

belonged to the Standard American Dredging Company or not, the United States Supreme Court has so held in the authorities cited in our opening brief; one of the Atlas engines, however, belonged to the California Reclamation Company, which, as heretofore stated, appears to be about the same company as the Standard, except in name.

VII.

The lower Court was correct in giving judgment for costs; this proceeding was brought to obtain possession of a dredger wrongfully withheld; being refused possession of its property, appellant was forced to file a libel to get it; a large part of the evidence in the case is in support of the Standard American Dredging Company's contention that libellant was not entitled to the dredge at the time the libel was filed; they still claim that the position of the Standard American Dredging Company on the question of costs is about as follows: "We withheld your property; we forced you into court to obtain possession of it; the court found that we had no right to withhold possession (of course, under that finding the Standard people were guilty of a wrong), but you should pay the costs of obtaining what rightfully belonged to you, and which we wrongfully withheld."

Claimant in paragraph IV of its answer (pp. 73-79) denied right of possession in libellant at the time of the filing of the libel.

In paragraph V (pp. 79-80) it raised an issue as to its value, which might have become material.

In paragraph VI (p. 80) it raised an issue as to the damages sustained by libellant from August 15th to the date of the filing of the libel.

In paragraph VIII (pp. 80, 82) it denied the jurisdiction of the Court.

On pages 88 and 89 will be found matters in claimant's answer upon which it bases a claim for an offset, in amount about \$600.00, upon which the lower Court found in libellant's favor; all those matters had to be tried and testimony taken on the whole matter; the Standard American Dredging Company tendered those issues, forced the libellant to take testimony on them, and now says it ought not to pay the costs. There is no question that the ruling of the lower Court on costs is correct.

VIII.

We do not recede from our position as to the motives of the Standard American Dredging Company in refusing to deliver the dredge "Richmond No. 1." While the charter parties, as a whole, may not be models of clearness, we still insist that the section 10 of that charter party of February 26th, 1910, leaves no room for discussion as to the right of the libellant to receive its dredge back when it delivered the "Oakland." If counsel construed it otherwise, we attribute their construction to an error of judgment, disastrous to the libellant but profitable to their clients, and for which their clients are responsible.

IX.

There is absolutely nothing in the evidence that warrants counsel's statement that appellant's motives were actuated by a desire to obtain the Atlas engines that were on the "Richmond No. 1"; of course, when demand was made for the "Oakland" the Richmond Company had the right to return it forthwith; the correspondence on the subject is as follows.

Counsel have not included all the letters on page 54 of appellees' brief, nor all of the contents of any letter.

The first is of date August 12th, 1910 (p. 793) from the Standard Company to the Richmond Company, and reads:

"In accordance with the lease and agreement between you and this company, dated February 26, 1910, we hereby notify you that we have secured work which we desire to do by the use of the dredger "Oakland", and therefore terminate said lease, and require you to return said dredger "Oakland" to us at Richmond within fifteen days after the service on you of this notice."

The demand was so worded that the dredge was acceptable at any time within fifteen days, and Mr. Cutting testified that at the time he received it he told them he would have to have the dredger "Richmond No. 1" back; of course he had a right to get it back, and expected he would get it back, and acting upon that belief, the "Oakland" was returned; he never for a moment supposed he would be left

without a dredge for eleven days, or any number of days, for which counsel complain on page 55 of brief.

The next letter is from the Richmond Dredging Company to the Standard American Dredging Company, found on pages 794-795, dated August 16th, 1910, and reads:

"Your communication of even date, specifying a number of things which you say are necessary to put your dredger 'Oakland' in good condition is just at hand. I wish to state that it is the unanimous opinion of all the men who have had the dredger in hand during the continuation of our contract that your dredger is in better condition by far than it was when we received it. If there are a few connections worn out or a few bearings needing babetting you will have to accept that under the head of reasonable wear and tear. As to the shovels and spikes, I cannot say whether there was two dozen shovels and a keg of spikes on board when we received it or not, but if you say there was and you feel that their use does not come under the head of reasonable wear and tear, we will supply the shovels and the spikes at your demand.

"Again we notify you that we are through with the dredger and that it is at your disposal at and risk in the canal at Richmond."

The next letter was from the appellant to the Standard American Dredging Company, dated the same date (p. 796), and reads:

"Confirming our conversation of yesterday afternoon we wish to notify you that we have completed the work which we desire to do with your

dredge 'Oakland' and that it is now in the Richmond canal at your disposal and risk.

"We hereby make demand on you for the immediate return to us at Richmond of our dredger, 'Richmond No. 1', as per our contract."

The above letters show one party living up to its contract and the other party to the same contract violating it; what difference would eleven days' work have made? Subsequent developments show that appellant would not have received its dredger then, even if it had used the "Oakland" the eleven days mentioned.

On the top of page 55 of brief appears the following:

"It appears that on October 12th, libellant procured an extension of six months to perform its contract with the City of Richmond."

No page is given where to find that in the transcript; the writer has endeavored to find that subject in the transcript but has been unable to do so.

The charter party was terminated by the act of the Standard American Dredging Company demanding the return of their dredger "Oakland", and it was so held by the lower Court; yet the lower Court, by striking out the claims for damages on the City of Richmond job, denied to the appellant the opportunity of proving the damages which it sustained by reason of the wrongful withholding of the dredger "Richmond No. 1", and while the lower Court decided that the Standard American Dredging Com-

pany terminated the charter party of August 15th, 1910, by its own act, and that after that date it had no right to the dredger "Richmond No. 1", and that said dredger was wrongfully withheld from the possession of appellant; yet the Standard American Dredging Company was permitted to remove, from the premises, fixtures which were a part of said dredger "Richmond No. 1" at the time of the termination of the lease and remained a part of said dredger for four months after the termination of the lease; we submit the trial Court in this committed an error. There was, therefore, no striking inconsistency in Mr. Cutting's testimony as suggested on page 55 of appellees' brief, as the action of the trial Court excluded this branch of testimony from the case.

There is nothing in the record to show that the appellant would not have been able to have performed the Stockton contract, after the completion of the Richmond contract, if its possession of its dredge had not been interfered with the previous August.

We respectfully submit that the decree should be reversed as urged in our opening brief.

W. H. H. HART,

Frederick ~~Counsel~~ for Appellant.

H. W. HUTTON,

Of Counsel.

No.

2234

IN THE
United States Circuit Court of Appeals
NINTH CIRCUIT

JOHN W. JOHNSON,

Appellant,

VS.

NORTH STAR LUMBER COMPANY, a corpora-
tion, et al,

Respondents.

Upon Appeal From the United States District
Court for the District of Oregon.

TRANSCRIPT OF RECORD.

RECEIVED

DEC 30 1912

F. D. MONCKTON,
CLERK

FILED

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No.

IN THE
United States Circuit Court of Appeals
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IN THE
United States Circuit Court of Appeals
NINTH CIRCUIT

JOHN W. JOHNSON,

Appellant,

vs.

NORTH STAR LUMBER COMPANY, a corpora-
tion, et al,

Respondents.

**Names and Addresses of Attorneys
upon this Appeal:**

For the Appellant:

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John Van Znate,

Hoquiam, Wash.
Spalding Bldg., Portland, Ore

For the Respondents:

Veazie & Veazie,

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INDEX

Answer and Cross Bill	6
Amendments to Original Bill of Complaint.....	14
Answer to Bill of Complaint and to Amendments thereto	29
Amendments Thereto—Answer to Bill of Com- plaint and to	29
Answer to Cross Bill	38
Appeal—Petition for	152
Assignments of Error	153
Appeal—Bond on	157
Appeal—Citation on	159
Bill of Complaint	1
Bill of Complaint—Amendments to Original.....	14
Bill—Cross	24
Bond on Appeal	157
Complaint—Bill of	1
Cross Bill—and Answer	6
Cross Bill	24
Cross Bill—Answer to	38
Court—Opinion of the	46
Citation on Appeal	159
Clerk's Certificate	161
Decree	52
Defendant's Exhibit A	138

	Page
Defendant's Exhibit B	143
Defendant's Exhibit C	147
Exceptions to Amendments to Original Bill of Complaint	22
Exhibits—Testimony and	54
Exhibits—Plaintiff's 1	66
Exhibits—Plaintiff's 2	125
Exhibits—Plaintiff's 3	130
Exhibits—Plaintiff's 4	134
Exhibits—Plaintiff's 5	137
Exhibits—Defendant's A	138
Exhibits—Defendant's B	143
Exhibits—Defendant's C	147
Error—Assignments of	153
Minutes of Trial—March 15, 1912	45
Original Bill of Complaint — Exceptions to Amendments to	22
Opinion of the Court	46
Order Enlarging Time to File Record	160
Plaintiff's Exhibit 1	66
Plaintiff's Exhibit 2	125
Plaintiff's Exhibit 3	130
Plaintiff's Exhibit 4	134
Plaintiff's Exhibit 5	135
Petition for Appeal	152
Replication	37
Trial—Minutes of March 15, 1912	45
Testimony and Exhibits	54
Time to File Record—Order Allowing	160

*In the District Court of the United States for the
District of Oregon.*

Be It Remembered, That on the 2 day of March, 1911, there was duly filed in the Circuit Court of the United States for the District of Oregon, a Bill of Complaint, in words and figures as follows, to wit:

[Bill of Complaint.]

*In the Circuit Court of the United States for the
District of Oregon.*

NORTH STAR LUMBER COMPANY, a corporation,

Plaintiff,

vs.

JOHN W. JOHNSON, HERMAN WINTERS and
JOHN WINTERS,

Defendants.

TO THE HONORABLE JUDGES OF THE CIR-
CUIT COURT OF THE UNITED STATES, IN
AND FOR THE DISTRICT OF OREGON:

The North Star Lumber Company, a corporation organized under the laws of the State of Minnesota and citizen of said State, having its principal office at Minneapolis, brings this its bill against John W. Johnson, Herman Winters and John Winters, all citizens of the State of Washington, residing at Hoquiam in said State, and inhabitants of said State of Washington.

First. Your orator shows unto your Honors, that the plaintiff in a private corporation, duly organized

and incorporated under the general laws of the State of Minnesota, on the 10th day of November, 1901; that the enterprise and business in which said corporation was organized to engage included among other things the buying and owning of lands in the State of Oregon; and that your orator has duly complied with all the laws of the State of Oregon with regard to the filing of articles, filing of reports and payment of license fees, and is licensed to do business in the State of Oregon.

Second. That on the 18th day of February, 1902, under the provisions of the Act of Congress of June 3, 1878, entitled "An Act for the Sale of Timber Lands in the States of California, Oregon, Nevada and in Washington Territory," as extended to all the public land states by Act of August 4, 1892, the United States of America, bargained and sold to one Aaron Johnson, the Northwest quarter ($NW\frac{1}{4}$) of Section Ten (10), Township twenty-one (21) South, Range seven (7) West of the Willamette Meridian, situate in Douglas County, State of Oregon, pursuant to due proceedings in the United States Land Office at Roseburg, Oregon, and issued to the said Aaron Johnson a certificate of sale No. 9090; and thereafter such proceedings were had and taken in the said Land Office and in the General Land Office of the United States, in said matter, that on the 10th day of September, 1906, the United States of America issued to the said Aaron Johnson, its patent, whereby it granted and conveyed to him under the laws aforesaid, the tract of real property above described.

Third. That on the 21st day of May, 1904, the said Aaron Johnson, a bachelor, by his deed duly executed, acknowledged and attested so as to entitle the same to record under the laws of the State of Oregon, granted, bargained, sold and conveyed and confirmed the said real property unto one Andrew Johnson; which said deed was duly recorded on the 7th day of June, 1904, in Book 49 of Deeds, at page 158 of the records of Deeds of said Douglas County, State of Oregon.

Fourth. That on or about the 8th day of April, 1907, the said Andrew Johnson hereinbefore mentioned, and Emma Johnson, his wife, for a valuable consideration, made, executed and delivered to the said Aaron Johnson, their deed of conveyance whereby they granted, bargained, sold, conveyed and confirmed unto the said Aaron Johnson the real property hereinbefore described and mentioned; which said deed was duly executed, acknowledged and attested in such manner as to entitle the same to be recorded under the laws of the State of Oregon; and the same was on the 24th day of April, 1907, duly recorded in Book 57 of Deeds, at page 103, of the Deed Records of said Douglas County in said State.

Fifth. That on or about the 28th day of March, 1907, the said Aaron Johnson, made and delivered to the plaintiff corporation his certain warranty deed, whereby, in consideration of \$2,000.00 to the said Aaron Johnson paid by the plaintiff, the said Aaron Johnson granted, bargained, sold and conveyed to the plaintiff the said Northwest quarter of Section

ten (10), Township twenty-one (21) South, of Range seven (7) West of the Willamette Meridian; and in and by said deed of conveyance the said Aaron Johnson covenanted and warranted to and with the plaintiff that he was, at the time of the execution thereof, the owner in fee simple of the said bargained premises; that said deed was executed, acknowledged and attested in such manner as to entitle the same under the laws of Oregon to be recorded and that the same was on the 24th day of April, 1907, duly recorded in Book 57 of Deeds, at page 103, of the Deed Records of Douglas County, State of Oregon.

Sixth. That pursuant to the conveyances aforesaid and by and through the same, the plaintiff became and has been ever since the 28th day of March, 1907, the owner in fee simple of the said real property, to wit, the Northwest quarter (NW $\frac{1}{4}$) of Section ten (10) in Township twenty-one (21) South of Range seven (7) West of the Willamette Meridian, in the State of Oregon; and the plaintiff is now the owner thereof. That the said land is vacant and unoccupied land and is not at this time in the possession of the said defendants, or any of them, or of any other person.

Seventh. That the said defendants John W. Johnson, Herman Winters and John Winters, and each of them, falsely and without right, claim to have some interest in or right and title to the said real property; but that in fact the said defendants have no interest in nor right or title to the said real property, nor has any of the said defendants any right, title or interest there-

in or thereto.

Eighth. That the said real property, to wit, the Northwest quarter of Section ten (10) Township twenty-one (21) South, of Range seven (7) West of the Willamette Meridian in the State of Oregon, is of the value of not less than Twenty-five Hundred (\$2,500.00) Dollars.

And your orator prays that the said defendants, and each of them may be required to appear and answer and to set forth what interest if any they and each of them claim and assert in or to the said real property; that the plaintiff may be decreed to be the owner in fee simple thereof, free and clear from all claim of said defendants and each of them; that the said defendants and each of them may be restrained and enjoined from hereafter setting up any claim or title to the said lands, or any part thereof, or in any manner meddling therewith, or removing any timber or other product therefrom; that the title of the plaintiff to the said real property may be quieted against the alleged claims of the defendants and each of them and that the defendants and each of them may be decreed to have no interest in the said property or any part thereof.

To the end that your orator may obtain the relief to which it is justly entitled in the premises, it now prays the Court to grant unto it due process by subpoena directed to the said John W. Johnson, Herman Winters and John Winters, defendants hereinbefore named, requiring and commanding each of them to appear herein and answer, but not under oath, the same being expressly waived, the several allegations

in this your orator's bill contained; and for such other and further relief as in equity may be meet and proper.

NORTH STAR LUMBER COMPANY,

By F. F. Williams, Its Attorney.

James N. Davis, Veazie & Veazie,

Solicitors for Plaintiff.

A. L. Veazie, of Counsel.

[Endorsed]: Bill of Complaint. Filed March 2, 1911.

G. H. MARSH,

Clerk.

By J. W. Marsh, Deputy.

And afterwards, to wit, on the 12 day of May, 1911, there was duly filed in said Court, an Answer and Cross Bill, in words and figures as follows, to wit:

[Answer and Cross Bill.]

*In the Circuit Court of the United States for the
District of Oregon.*

NORTH STAR LUMBER COMPANY, a corporation,

Plaintiff,

vs.

JOHN W. JOHNSON, HERMAN WINTERS and
JOHN WINTERS,

Defendants.

In answer to the said Bill, I, John W. Johnson, say as follows:

I.

In answer to the First Paragraph of said Complaint, I say that I have no knowledge or information as to matters and things therein alleged and I therefore deny the same and demand that the plaintiff be put upon strict proof thereof.

II.

I admit the allegations of Paragraph Two (2) of said Complaint.

III.

I admit that on or about the 21st day of May, 1904, Aaron Johnson, made and executed a Deed like unto the deed in Plaintiff's Complaint mentioned, but I deny that the said Andrew Johnson thereby acquired the equitable title to such property or any title to such property, as will more fully appear by my Cross Bill.

IV.

I admit that Andrew Johnson and Emma Johnson, his wife, made a deed like unto the deed mentioned in the Fourth Paragraph of said Complaint, which was thereafter, on or about the 24th day of April, 1907, duly recorded in the Deed Records of Douglas County, State of Oregon. I assert that I have no knowledge as to the time of execution or the date of delivery of such deed and I therefore demand strict proof of the allegations of such Complaint.

V.

I deny the allegations of Paragraph Five (5) of such Complaint.

VI.

I deny the allegations of the Sixth Paragraph of such Complaint, except that I admit that the said land is vacant and unoccupied land and is not at this time in the possession of any person.

VII.

For answer to the Seventh Paragraph of said Complaint, I admit that I claim to have some interest in or right and title to said property and I assert that I own the said property, absolutely and in fee simple and I deny that the plaintiff or the said defendants, Herman Winters and John Winters, or either of them, have any interest in or right or title to said property, all of which will more fully appear by my Cross Bill filed herein.

VII.

I admit the allegations of Paragraph Eight (8).

IX.

And for answer to all and every, of the allegations of such Complaint, I deny each and every of such allegations, except in so far as the same are heretofore specifically admitted.

CROSS BILL.

And for a Cross Bill, your orator, John W. Johnson, defendant above named, brings this his Cross Bill against the North Star Lumber Company, the plaintiff herein, claiming to be a corporation of the State of Minnesota and a citizen of said States.

I.

He alleges that he is a citizen of the State of Washington, residing at the City of Hoquiam in said State.

II.

He alleges that on the 18th day of February, 1902, under the provisions of the Act of Congress of June 3rd, 1878, entitled "An Act for the Sale of Timber Lands in the States of California, Oregon, Nevada and in Washington Territory," as extended to all the public land states by Act of August 4th, 1892, the United States of America, bargained and sold to one Aaron Johnson, the Northwest quarter (NW $\frac{1}{4}$) of Section Ten (10), Township Twenty-one (21) South, Range Seven (7) West of the Willamette Meridian, situate in Douglas County, State of Oregon, pursuant to the proceedings in the United States Land Office at Roseburg, Oregon, and issued to the said Aaron Johnson a certificate of Sale No. 9090; that thereafter such proceedings were had and taken in the said Land Office and in the General Land Office of the United States, in said matter; that on the 10th day of September, 1906, the United States of America issued to the said Aaron Johnson, its patent, whereby it granted and conveyed to him under the laws aforesaid, the tract of real property above mentioned.

III.

That thereafter, the said Aaron Johnson, made a deed like unto the deed set out in Paragraph Three of Plaintiff's Complaint, which purported to convey his interest to one Andrew Johnson, and that on or about the 8th day of April, 1907, the said Andrew Johnson and his wife, Emma Johnson, re-conveyed such property to the said Aaron Johnson by a Warranty Deed, whereby they granted, bargained, sold,

conveyed and confirmed unto the said Aaron Johnson the real property mentioned and described in Paragraph Two (2) of this Cross Bill. And in fact, as this your orator, is informed and believes, such conveyance was either fraudulent and made for the purpose of defrauding the creditors of Aaron Johnson, of whom, this your orator was one, or the same was intended as a mortgage to secure the payment of sums of money and was not in fact a conveyance of said Estate; but that whether this be true or not, by the deed of April 8th, 1907, the said Aaron Johnson became the owner in fee simple of such property heretofore described.

IV.

That on the 1st day of April, 1907, your orator commenced an action in the Circuit Court of Oregon, in Douglas County, in which he, your orator, John W. Johnson, was plaintiff and Aaron Johnson and Eline Engebritson were defendants, the same being Cause No....., in said Court upon a certain Promissory Note, made and executed by the said Aaron Johnson. That upon the said 1st day of April, A. D., 1907, he caused an Affidavit of Attachment to be made in and arising out of said action and entered into an Undertaking for Attachment in said action and that thereupon a writ of Attachment was issued out of said Court, and pursuant to said writ, one H. T. McClallen, Sheriff of said Douglas County, Oregon, duly attached all of the interest of the said Aaron Johnson in and to the property heretofore described, being the Northwest Quarter (NW $\frac{1}{4}$) of Section

Ten (10), in Township twenty-one (21) South of Range seven (7) West Willamette Meridian in Douglas County, Oregon. That thereafter, in due course, made return of said levy and that thereby the said Court acquired jurisdiction of such property and that as this Defendant is informed and believes and asserts the fact to be, such attachment rested upon said property, but that in any event, such attachment took effect and held such property upon the 8th day of April, 1907, thereafter when the Deed heretofore mentioned was made and delivered by the said Andrew Johnson and his wife, to the said Aaron Johnson, as heretofore set out.

V.

That thereafter, in due course, such cause came on regularly for trial and judgment in the Circuit Court of the State of Oregon, for Douglas County, and judgment was found and entered in favor of your orator, the plaintiff in that action, and the defendant herein, by the terms of which judgment it was adjudged that your orator have and recover a money judgment against the said Aaron Johnson and Eline Engebritson; and further, it was adjudged that the real property theretofore attached in said action, be sold in the manner prescribed by law, (said property being the same property involved in this action), and by the terms of which said judgment, it was held that such property was subject to the attachment levied April 1st, 1907.

VI.

That thereafter, in due course, an order of sale was

made and execution was issued and in due course a sale was had of the property, at which time and place, this your orator, purchased such property; and that thereafter, on the 12th day of October, 1908, by order of the said Court, such sale was confirmed.

VII.

That thereafter, on the 20th day of November, 1909, one B. Fenton, Sheriff of the County of Douglas, State of Oregon, pursuant to the order heretofore mentioned, made and executed his Sheriff's deed to the property heretofore described, which deed was regularly acknowledged and entitled to record and was thereafter recorded on the 20th day of November, 1909, in Book Sixty-six (66) of Deeds of Douglas County, State of Oregon, on pages 364 and 365. That by reason of the foregoing facts, your orator became and now is, the owner in fee simple of said real property, the Northwest Quarter (NW $\frac{1}{4}$), of Section Ten (10) in Township Twenty-one (21) South, of Range seven (7), West of Willamette Meridian in Douglas County, State of Oregon, and this your orator John W. Johnson, the defendant above named, is now the owner of. That the said plaintiff, the North Star Lumber Company, a corporation, falsely and without right, claims to be the owner and to have such interest in or right, or title to the said real property, but that in fact, the said North Star Lumber Company has no such interest, nor right, nor title to said real property, nor has any of the defendants any such right or title, save and except, this your orator, John W. Johnson.

VIII.

And your orator prays that he may be decreed to be the owner in fee simple of such property, free and clear from all claims of the said plaintiff, or of the claims of Herman Winters and John Winters, and that the said plaintiff and deiendants mentioned, and each of them, may be restrained and enjoined from hereafter setting up any claim or title to said land or any part thereof or in any way meddling with or removing any timber or any other product therefrom. That the title of your orator, this defendant, to said real property may be quieted against the alleged claim of the plaintiff and the said defendants and each of them, and that said plaintiff and the said defendants, and each of them, may be decreed to have no interest in the said property or any part thereof.

JOHN W. JOHNSON,

Answering Defendant.

JOHN VAN ZANT,

Solicitor for Answering Defendant.

MORGAN & BREWER,

of Counsel for Answering Defendant.

UNITED STATES OF AMERICA,

Western District of Washington—ss.

John W. Johnson, being first duly sworn, says: That he is the Cross Complainant in the above Cross Bill; that he has read the same and that in so far as the same relates to his own acts, the same is true, and in so far as it relates to the acts of others, he believes this to be true.

JOHN W. JOHNSON.

Subscribed and sworn to before me this 10 day of May, A. D., 1911.

[Seal.]

L. A. BREWER,

Notary Public in and for the State of Washington,
residing at Hoquiam.

[Endorsed]: Answer and Cross Bill. Filed May 12, 1911.

G. H. MARSH,

Clerk.

And afterwards, to wit, on the 7 day of June, 1911,
there was duly filed in said Court, Amendments
to Original Bill of Complaint, in words and fig-
ures as follows, to wit:

[Amendments to Original Bill of Complaint.]

*In the Circuit Court of the United States for the
District of Oregon.*

NORTH STAR LUMBER COMPANY, a corpora-
tion,

Plaintiff,

vs.

JOHN W. JOHNSON, HERMAN WINTERS and
JOHN WINTERS,

Defendants.

TO THE HONORABLE JUDGES OF THE CIR-
CUIT COURT OF THE UNITED STATES,
FOR THE DISTRICT OF OREGON:

The North Star Lumber Company, the plaintiff
above named, by leave of Court this day granted,
amends its bill of complaint so that the same shall
be responsive to the matters set up in the answer

of the defendant John W. Johnson, by adding thereto the following paragraphs, and by showing to the Court as follows, to wit:

Ninth. That the said defendant John W. Johnson alleges and pretends contrary to the truth, that on the first day of April, 1907, a writ of attachment was issued out of the Circuit Court of the State of Oregon, for Douglas County, in a certain action at law commenced by him in said Court, in which he was plaintiff and Aaron Johnson and Eline Engerbritson were defendants, and further alleges and pretends, contrary to the truth, that pursuant to said writ one H. T. McClallen, the Sheriff of said Douglas County, Oregon, attached all of the interest of the said Aaron Johnson in and to the real property hereinbefore described, to wit, the Northwest quarter ($NW\frac{1}{4}$) of Section ten (10) in Township twenty-one (21) South, of Range seven (7) West, of the Willamette Meridian, in Douglas County, Oregon, but plaintiff alleges the truth in this regard to be, that on the date of the issuance of the said writ and the levy thereof, neither of the said defendants in said action, Aaron Johnson nor Eline Engerbritson, had any right, title or interest whatsoever in or to the said real property, or any part thereof.

Tenth. That likewise the said defendant John W. Johnson alleges and pretends contrary to the truth, that thereby the said Circuit Court of the State of Oregon, for Douglas County, acquired jurisdiction of the real property involved in this suit; but the plaintiff alleges the truth in this regard to be that the

said real property at the time of the pretended attachment thereof and of the levy and return of said writ was the property of the plaintiff herein, and that no other person had any right, title or interest therein or thereto; and that neither of the said defendants Aaron Johnson nor Eline Engebritson was either the owner or the record owner thereof, or had any interest, real or apparent, therein or thereto; and plaintiff further alleges that neither of said defendants Aaron Johnson nor Eline Engebritson was in possession of or pretending or holding himself or herself out to be the owner of said real property at the time of the levy of said pretended attachment or the return thereof, or at the time of any subsequent proceedings in relation to said real property in said action at law.

Eleventh. That the said defendant John W. Johnson alleges and pretends, contrary to the truth, that thereafter said action commenced by him in the Circuit Court of the State of Oregon for the County of Douglas, against the said Aaron Johnson and Eline Engebritson, came on regularly for trial and judgment in said Circuit Court of the State of Oregon, for Douglas County; and further pretends and alleges, contrary to the truth, that in said cause and Court judgment was found and entered in favor of the said defendant John W. Johnson, the plaintiff therein, and further alleges and pretends, contrary to the truth, that by the terms of said judgment it was adjudged that the said defendant John W. Johnson should have and recover a money judgment against the said Aaron Johnson and Eline Engebritson, and further alleges

and pretends, contrary to the truth, that it was adjudged therein that the real property heretofore described, and which it had been intended to attach in said action, should be sold in the manner prescribed by law, the same being the property involved in this suit; and further alleges and pretends contrary to the truth, that by the terms of said judgment it was held that said property was subject to the pretended attachment levied thereon on the first day of April, 1907; but plaintiff alleges the truth in this regard to be that the said Circuit Court of the State of Oregon, for the County of Douglas, never acquired or had jurisdiction in said action, either of the person of either of the defendants therein or of the said real property, to render any judgment whatsoever; that no service of summons therein either personally or by publication, or otherwise, was ever made upon either of the persons named as defendants therein; that neither of said defendants was, at the time of the bringing of said action; found or served with summons in anywise within the State of Oregon; that a pretended service by publication of summons was made therein, but that said pretended service was wholly void and ineffective for the reasons following, to wit: That neither of the said defendants therein Aaron Johnson nor Eline Engebritson had any property within the State of Oregon and that it was never made to appear in said Court and cause by affidavit, to the satisfaction of the Court or Judge thereof or judge authorized to grant the order for publication of summons, that the defendants therein named could

not, after due diligence, be found within the State of Oregon; that no affidavit showing or attempting to show such fact was filed in said court and cause, or presented to the court therein, and that the court had no evidence before it in said cause by affidavit upon which to grant any order for service of summons by publication; that the only paper therein attempting or purporting to show by affidavit that said defendants, or either of them, could not be found within the State of Oregon was a certain pretended affidavit not sworn to before, nor attested by, any person authorized under the laws of the State of Oregon, to administer oaths or to take or authenticate affidavits, to wit, a certain pretended affidavit made by the said plaintiff in said action John W. Johnson, the defendant herein, in the County of Chehalis and State of Washington, at Hoquiam in said State, on the 7th day of September, 1907, before one Charles W. Hodgdon, a Notary Public for the State of Washington, whereas, by the law of the State of Oregon then in force, being Section 819 of Bellinger and Cotton's Annotated Codes and Statutes of Oregon, it is provided that:

An affidavit or deposition taken in another state of the United States or a territory thereof, the District of Columbia, or in a foreign country, otherwise than upon commission, must be authenticated as follows, before it can be used in this state:

1. It must be certified by a commissioner, appointed by the governor of this state to

take affidavits and depositions in such other state, territory, district or country; or

2. It must be certified by a judge of a court having a clerk and a seal, to have been taken and subscribed before him, at a time and place therein specified, and the existence of the court, the fact that such judge is a member thereof, and the genuineness of his signature shall be certified by the clerk of the court, under the seal thereof;

and the plaintiff alleges that said pretended affidavit was and is null and void and of no effect whatsoever in said cause; and the plaintiff further alleges that on the 9th day of September, 1907, a pretended order for publication of summons in said action was made by the Honorable G. W. Wonacott, County Judge for Douglas County, Oregon, but that no publication was in fact made thereon; and that no further or other order that summons be served by publication in said cause was made therein, but that a pretended order therefor, never signed by any judge, was filed in said court on or about the 11th day of October, 1907, which said pretended order was void and of no effect because not signed and because there was not at the time of the making thereof, or at all, filed or presented in said cause any affidavit showing that the said defendant could not after due diligence be found within the State of Oregon, the only paper pretending to be an affidavit showing said fact presented in said cause being the said pretended affidavit hereinbefore mentioned, which was filed therein on or about

the 9th day of September, 1907; and that the said court, at the time the said pretended order for publication was made, had before it no proof by affidavit whatsoever that the said defendants could not be found within said State of Oregon, at said time, or otherwise.

Twelfth. That thereafter and beginning on the 14th day of October, 1907, and for six successive weeks, a pretended summons in said action was published; and that no other service or attempted service of summons therein was ever made than said publication; which said service by publication, plaintiff alleges was wholly null and void by reason of the fact that the said court never had before it any evidence by affidavit that the defendants therein could not after due diligence be found within the State of Oregon, and for the other reasons aforesaid.

Thirteenth. That the said defendant John W. Johnson likewise alleges and pretends, contrary to the truth, that an order of sale was made and execution was issued and that a sale was had of the said real property in said action, in the Circuit Court of the State of Oregon, for the County of Douglas, and that the said defendant purchased the said real property on such sale and received a sheriff's deed therefor; but plaintiff alleges the truth in this regard to be that no valid attachment or judgment was ever made or given in said action; that neither the said Aaron Johnson nor the said Eline Engebritson had or owned, or appeared of record to have or own, or pretended or held himself or herself out as having owned

any right, title or interest whatsoever in or to the said real property, or any part thereof.

Fourteenth. That the said defendant John W. Johnson, contrary to the truth, alleges and pretends that by virtue of the said proceedings in said action at law, in the Circuit Court of the State of Oregon for the County of Douglas, and the said execution and sale, he acquired and has some right, title or interest in or to the said real property; but the plaintiff alleges the truth in this regard to be that said proceedings were and are wholly void and of no effect for the reasons hereinbefore stated, and that the said defendant John W. Johnson did not acquire and does not own any right, title or interest in or to the said real property by virtue thereof, or otherwise.

WHEREFORE, to the end that your orator may obtain the relief to which it is justly entitled in the premises, it now prays the Court that the said defendant John W. Johnson may be required to answer herein, but not under oath, the same being expressly waived, the several allegations in your orator's original bill of complaint, and the amendments thereto herein set forth; and that your orator have the relief prayed for in the original bill of complaint.

NORTH STAR LUMBER COMPANY,

By A. L. Veazie, Its Attorney.

Veazie & Veazie,

Solicitors for Plaintiff.

James N. Davis,

of Counsel.

[Endorsed]: Amendments to Original Bill of

Complaint. Filed June 7, 1911.

G. H. MARSH,
Clerk.

And afterwards, to wit, on the 23 day of June, 1911,
there was duly filed in said Court, Exceptions to
Amendments to Original Bill of Complaint, in
words and figures as follows, to wit:

**[Exceptions to Amendments to Original Bill of Com-
plaint.]**

*In the Circuit Court of the United States for the
District of Oregon.*

NORTH STAR LUMBER COMPANY, a corpora-
tion,

Plaintiff,

vs.

JOHN W. JOHNSON, HERMAN WINTERS and
JOHN WINTERS,

Defendants.

Comes now the defendant, John W. Johnson, and
excepts to that portion of the Plaintiff's amendments
to original bill of Complaint, commencing with the
words "but plaintiff" in line fifteen (15) on Page
three (3) in said amendments, including the remain-
der of such page and the whole of page four (4) and
including that portion of the Eleventh (11th) para-
graph contained on Page five (5) for impertinence,
and prays the Court that this portion be stricken, for
this, that under the decisions of Courts of the United
States, this Court will not enter upon an investigation
of defects and informalities in the Affidavit of Publi-

cation mentioned, made and committed by the Circuit Court of the State of Oregon in this collateral proceeding.

And this defendant likewise excepts and objects to the Twelfth (12th) Paragraph of said amendments for like impertinence and for the reasons heretofore set forth.

And this defendant likewise excepts and objects to Fourteenth (14th) Paragraph of said amendments for like impertinence and for the reasons heretofore set forth.

WHEREFORE, he prays that these matters may be inquired into by the Court or referred to a Master for inquiry and that upon such inquiry, the paragraphs and portions of paragraphs heretofore referred, be severally stricken.

MORGAN & BREWER,
Solicitors for Defendant.

John Van Zante,
of Counsel.

[Endorsed]: Exception. Filed June 23, 1911.

G. H. MARSH,
Clerk.

And afterwards, to wit, on the 21 day of August, 1911, there was duly filed in said Court, an Order in words and figures as follows, to wit:

[Order Overruling Exceptions to Amendments to Bill of Complaint.]

*In the Circuit Court of the United States for the
District of Oregon.*

NORTH STAR LUMBER COMPANY,

v.

JOHN W. JOHNSON, et al.

No. 3719.

August 21, 1911.

This cause was heard upon the exceptions filed by the defendants to the amendments to the bill of complaint herein, and was argued by Mr. Arthur L. Veazie, of counsel for the plaintiff, and by Mr. L. H. Brewer and Mr. John Van Zante, of counsel for said defendants; On Consideration Whereof, IT IS ORDERED AND ADJUDGED that said exceptions be, and the same are hereby, overruled; and on motion of said defendants IT IS FURTHER ORDERED that they be, and they are hereby, allowed fifteen days from this date in which to file an amended answer herein.

R. S. BEAN,

Judge.

And afterwards, to wit, on the 18 day of September, 1911, there was duly filed in said Court, a Cross Bill, in words and figures as follows, to wit:

[Cross Bill.]

*In the Circuit Court of the United States for the
District of Oregon.*

NORTH STAR LUMBER COMPANY, a corporation,

Plaintiff,

vs.

JOHN W. JOHNSON, HERMAN WINTERS and
JOHN WINTERS,

Defendants.

TO THE HONORABLE JUDGES OF THE CIR-
CUIT COURT OF THE UNITED STATES,
FOR THE DISTRICT OF OREGON:

John W. Johnson, one of the defendants in the original action in which this "Cross Bill" is filed, and a citizen of the State of Washington, brings this his Cross Bill against the plaintiff, the North Star Lumber Company, a corporation, and a citizen of the State of Minnesota, and he alleges and shows to the Court as follows:

I.

That this proceeding is one brought on the part of the North Star Lumber Company, a corporation, against this defendant and others to quiet the title to lands situated in Douglas County, State of Oregon and described as follows:

The Northwest Quarter (NW $\frac{1}{4}$) of Section Ten (10), in Township Twenty-one (21) South, of Range Seven (7) West, of the Willamette Meridian, in Douglas County, Oregon.

That such lands are vacant and unoccupied; that, as will hereinafter more particularly appear, this Cross Complainant is the owner in fee simple of the lands above described and brings this his Cross Bill to have his title thereto quieted as against the plaintiff, the North Star Lumber Company, a corporation.

II.

That on the 1st day of April, 1907, your orator, commenced an action in the Circuit Court of Oregon, in Douglas County, in which he, your orator, John W. Johnson, was plaintiff and Aaron Johnson and Eline Engebritson were defendants, the same being Cause No....., in said Court, upon a certain Promissory Note, made and executed by the said Aaron Johnson. That upon the said 1st day of April, A. D., 1907, he caused an Affidavit of Attachment to be made in and arising out of said action and entered into an undertaking for Attachment in said action and that thereupon a writ of attachment was issued out of said Court, and pursuant to said Writ, one H. T. McClallen, Sheriff of said Douglas County, Oregon, duly attached all of the interest of said Aaron Johnson in and to the property heretofore described, being the Northwest Quarter (NW $\frac{1}{4}$) of Section Ten (10), in Township Twenty-one (21) South, of Range Seven (7) West, Willamette Meridian, in Douglas County, Oregon. That thereafter, in due course, made return of said levy and that thereby the said Court acquired jurisdiction of such property and that as this Defendant, John W. Johnson, is informed and believes and asserts the fact to be, such attachment rested upon said property, but that in any event, such attachment took effect and held such property upon the 8th day of April, 1907, thereafter when the Deed heretofore mentioned was made and delivered by the said Andrew Johnson and his wife to the said Andrew Johnson and his wife to the said Aaron Johnson, as

heretofore set out.

III.

That thereafter, in due course such cause came on regularly for trial and judgment in the Circuit Court of the State of Oregon, for Douglas County and judgment was found and entered in favor of your Orator, John. W. Johnson, the plaintiff in that action, and the defendant herein, by the terms of which judgment it was adjudged that your orator have and recover a money judgment against the said Aaron Johnson and Eline Engebritson; and further, it was adjudged that the real property theretofore attached in said action, be sold in the manner prescribed by law, (said property being the same property involved in this action), and by the terms of which said judgment, it was held that such property was subject to the attachment levied April 1st, 1907.

IV.

That thereafter, in due course, an order of sale was made and execution was issued and in due course a sale was had of the property, at which time and place, this your orator, purchased such property; and that thereafter, on the 12th day of October, 1908, by order of the said court, such sale was confirmed.

V.

That thereafter, on the 20th day of November, 1909, one B. Fenton, Sheriff of the County of Douglas, State of Oregon, pursuant to the order heretofore mentioned, made and executed his Sheriff's deed to the property heretofore described, which deed was

regularly acknowledged and entitled to record and was thereafter recorded on the 20th day of November, 1909, in Book Sixty-six (66) of Deeds of Douglas County, on pages 364 and 365. That by reason of the foregoing facts, your orator became and now is, the owner in fee simple of said real property, the Northwest Quarter (NW $\frac{1}{4}$), of Section Ten (10), in Township Twenty-one (21) South of Range Seven (7), West of Willamette Meridian in Douglas County, State of Oregon, and this your orator, John W. Johnson, the defendant above named, is now the owner of. That the said plaintiff, the North Star Lumber Company, a corporation, falsely and without right, claims to be the owner and to have such interest in or right, or title to the said real property, but that in fact, the said North Star Lumber Company, a corporation, has no such interest, nor right nor title to said real property, nor have any of the defendants any such right or title, save and except, this your orator, John W. Johnson.

VI.

And your orator, this Cross Complainant, prays that said plaintiff may be required to appear and answer and to act forth what interest, if any, it claims or asserts in or to the said real property involved, and that this Cross Complainant may be decreed to be the owner in fee simple of such property, free and clear from all claims of the said plaintiff and that said plaintiff may be restrained and enjoined from hereafter setting up any claim or title to said lands or any

part thereof, or in any way meddling with or removing any timber or any other product therefrom. That the title of your Orator, this Cross Complainant, to said real property may be quieted against the alleged claim of the plaintiff and that the said plaintiff may be decreed to have no interest in and to said property or any part thereof. And to that end your Orator prays the Court to grant him process, directing the said North Star Lumber Company, a corporation, requiring and commanding it to appear herein and answer to this Cross Bill, but not under oath, the same being expressly waived; and for such other and further relief as in this equity may be meet and proper.

JOHN W. JOHNSON,

Cross Complainant.

MORGAN & BREWER,

Solicitors for Cross Complainant.

JOHN VAN ZANTE,

of Counsel for Cross Complainant.

[Endorsed]: Cross Bill. Filed Sept. 18, 1911.

G. H. MARSH,

Clerk.

And afterwards, to wit, on the 18 day of September, 1911, there was duly filed in said Court, an Answer, in words and figures as follows, to wit:

**[Answer to Bill of Complaint and to Amendments
Thereeto.]**

*In the Circuit Court of the United States for the
District of Oregon.*

NORTH STAR LUMBER COMPANY, a corporation,
Plaintiff,

vs.

JOHN W. JOHNSON, HERMAN WINTERS and
JOHN WINTERS,

Defendants.

Comes now, John W. Johnson, one of the defendants in the above suit and for answer to original Bill says:

I.

In answer to the First Paragraph of said Complaint, I say that I have no knowledge or information as to matters and things therein alleged and I therefore deny the same and demand that the plaintiff be put upon strict proof thereof.

II.

I admit the allegations of Paragraph Two (2) of said Complaint.

III.

I admit that on or about the 21st day of May, 1904, Aaron Johnson, made and executed a Deed like unto the Deed in Plaintiff's Complaint mentioned, but I deny that the said Andrew Johnson thereby acquired the equitable title to such property or any title to such property, as will more fully appear by my Cross Bill.

IV.

I admit that Andrew Johnson and Emma Johnson, his wife, made a Deed like unto the deed mentioned in the Fourth Paragraph of said Complaint, which

was thereafter, on or about the 24th day of April, 1907, duly recorded in the Deed Records of Douglas County, State of Oregon. I assert that I have no knowledge as to the time of execution or the date of delivery of such deed and I therefore demand strict proof of the allegations of such complaint.

V.

I deny the allegations of Paragraph Five (5) of such Complaint.

VI.

I deny the allegations of the Sixth Paragraph of such Complaint, except that I admit that the said land is vacant and unoccupied land and is not at this time in the possession of any person.

VII.

For answer to the Seventh Paragraph of said Complaint, I admit that I claim to have some interest in or right and title to said property and I assert that I own the said property, absolutely and in fee simple and I deny that the plaintiff or the said defendants, Herman Winters and John Winters or either of them, have any interest in or right or title to said property, all of which will more fully appear by my Cross Bill filed herein.

VIII.

I admit the allegations of Paragraph Eight (8).

IX.

And for answer to all and every, of the allegations of such Complaint, I deny each and every of such allegations, except in so far as the same are heretofore specifically admitted.

And in answer to the Amendments to Original Bill, he says:

In answer to the Ninth Paragraph of said Amendments, he says that in truth and in fact, on the First day of April, 1907, a Writ of Attachment was issued out of the Circuit Court of the State of Oregon, for Douglas County, in a certain action at Law commenced by him in said Court in which he was plaintiff and Aaron Johnson and Eline Engebritson were defendants, and that in truth and in fact, pursuant to said Writ, one H. T. McClallen, the Sheriff of Douglas County, Oregon, attached all of the interest of the said Aaron Johnson in and to the real property heretofore described, to-wit:

The Northwest Quarter (NW $\frac{1}{4}$) of Section Ten (10), in Township Twenty-one (21), South of Range Seven (7) West, of the Willamette Meridian, in Douglas County, Oregon,

and that in truth the said Aaron Johnson was the owner of said property, in this that on the 18th day of February, 1902, under the provisions of the Act of Congress of June 3rd, 1878, entitled "An Act for the Sale of Timber Lands in the States of California, Oregon, Nevada and in Washington Territory," as extended to all the public land states by Act of August 4th, 1892, the United States of America, bargained and sold to one Aaron Johnson, the Northwest Quarter (NW $\frac{1}{4}$) of Section Ten (10), Township Twenty-one (21), South of Range Seven (7) West, of the Willamette Meridian, situate in Douglas County,

State of Oregon, pursuant to due proceedings in the United States Land Office at Roseburg, Oregon, and issued to the said Aaron Johnson a certificate of Sale No. 9090; that thereafter such proceedings were had and taken in the said Land Office and in the General Land Office of the United States, in said matter, that on the 10th day of September, 1906, the United States of America issued to the said Aaron Johnson, its patent, whereby it granted and conveyed to him under the laws aforesaid, the tract of real property above described, and that he thereby acquired said property; and further, that thereafter, the said Aaron Johnson made a deed like unto the deed set out in Paragraph Three of Plaintiff's Complaint, which purported to convey his interest to one Andrew Johnson, and that on or about the 8th day of April, 1907, the said Andrew Johnson and his wife, Emma Johnson, re-conveyed such property to the said Aaron Johnson by a Warranty Deed, whereby they granted, bargained, sold, conveyed and confirmed unto the said Aaron Johnson the real property mentioned and described in Paragraph Two (2) of this Cross Bill. And in fact, as this your orator, John W. Johnson, is informed and believes, such conveyance was either fraudulent and made for the purpose of defrauding the creditors of Aaron Johnson, of whom, this your orator was one, or the same was intended as a mortgage to secure the payment of sums of money and was not in fact a conveyance of said Estate; but that whether this be true or not, by the deed of April 8th, 1907, the said Aaron Johnson became the owner in fee simple of such prop-

erty heretofore described.

And the defendant, John W. Johnson, alleges that in truth and in fact, the said Circuit Court of the State of Oregon, for Douglas County, thereby acquired jurisdiction of the real property involved in this suit, and of the subject matter of the action in the Circuit Court of the State of Oregon, for Douglas County, and he denies that the property referred to was the property of the Plaintiff, and alleges that if the plaintiff had, at that time acquired any interest in said property, nevertheless, such interest was represented by an unrecorded deed and that under the laws of the State of Oregon, the attachment levied by him took precedence over such unrecorded deed in this that, the laws of the State of Oregon, Section 302, of Volume I, of Bellinger and Cotton's Annotated Codes and Statutes of the State of Oregon, provide as follows:

"From the date of the attachment until it be discharged or the writ executed, the plaintiff, as against third persons, shall be deemed a purchaser in good faith and for a valuable consideration of the property, real or personal, attached, subject to the conditions prescribed in the next section as to real property. Any person, association, or corporation mentioned in subdivision 3 of Section 301, from the service of a copy of the writ and notice as therein provided, shall, unless such property, stock, or debts be delivered, transferred, or paid to the Sheriff, be liable to the plaintiff for the amount thereof until the attachment be discharged or any judgment recovered by him be satisfied (L. 1862; D. Cd. No. 148; H. C. No. 150.)"

and that thereby this answering defendant became a purchaser in good faith and for valuable consideration as of date of April 1st, 1907.

For answer to Paragraph Ten (10), he alleges that in truth and in fact, the Circuit Court of the State of Oregon, for Douglas County, acquired jurisdiction of the real property involved in this suit and that as heretofore alleged, he became by said attachment, the bona fide owner for value.

In answer to the Eleventh Paragraph, he alleges and affirms, that after said attachment, said action commenced by him in the Circuit Court of the State of Oregon, in the County of Douglas, against the said Aaron Johnson and Eline Engebritson, came on regularly for trial, and trial and judgment were had in said Circuit Court and judgment was found and entered in favor of this Defendant, John W. Johnson, the Plaintiff therein, and that by the terms of said judgment, it was adjudged that this defendant, John W. Johnson, should have and recover a money judgment, and did recover a money judgment, and that it was adjudged therein that the real property involved and which had been attached in said action, should be sold, and that the same was regularly sold to this defendant, John W. Johnson, the plaintiff in that action, and that in truth it was held by the terms of said judgment, that the property involved was held subject to the attachment levied on the 1st day of April, 1907. That in truth and in fact, the Circuit Court of the State of Oregon, for the County of Douglas, had jurisdiction of the subject matter of the action and of

the real property involved herein, and that due and regular service of the summons was made by publication as provided by the laws of the State of Oregon, and that service was valid and effective; that such service was had by publication and after that it was made to appear in the said Court and Cause to the entire and complete satisfaction of the Court; that the defendants therein named, could not, after due and diligent search, be found within the State of Oregon and that the Court in that action so specifically found, and that thereafter, publication of the summons was had by order of the Circuit Court of the State of Oregon for Douglas County; that thereafter, said action proceeded regularly to judgment and sale, as heretofore alleged and thereby this Defendant, John W. Johnson acquired the lands heretofore described, in fee simple and free from the claims of the plaintiff in this action or any other persons, whomsoever.

WHEREFORE, this defendant, prays that the plaintiff herein be held and found to have no interest in and to said real property; that he have his costs and disbursements herein and that he have affirmative relief, quieting his title to said real property as prayed for in his Cross Bill filed in this action.

JOHN W. JOHNSON,

Answering Defendant.

MORGAN & BREWER,

Solicitors for Answering Defendant.

JOHN VAN ZANTE,

of Counsel for Answering Defendant.

[Endorsed]: Answer. Filed Sept. 18, 1911.

G. H. MARSH,
Clerk.

And afterwards, to wit, on the 30 day of September, 1911, there was duly filed in said Court, a Replication, in words and figures as follows, to wit:

[Replication.]

*In the Circuit Court of the United States for the
District of Oregon.*

NORTH STAR LUMBER COMPANY, a corporation,

Plaintiff,

vs.

JOHN W. JOHNSON, HERMAN WINTERS and
JOHN WINTERS,

Defendants.

Replication of Plaintiff in above cause to answer of John W. Johnson, Defendant.

This replicant, saving and reserving all advantages of exception to the manifold insufficiencies of said answer, for replication thereto saith that it will aver and prove its said bill to be true and sufficient, and that the said answer is untrue and insufficient.

WHEREFORE it prays relief as in said bill set forth.

JAMES N. DAVIS and
VEAZIE & VEAZIE,
Solicitors for Plaintiff.

[Endorsed]: Replication to Answer. Filed September 30, 1911.

G. H. MARSH,
Clerk.

And afterwards, to wit, on the 30 day of September, 1911, there was duly filed in said Court, an Answer to Cross Bill, in words and figures as follows, to wit:

[Answer to Cross Bill.]

*In the Circuit Court of the United States for the
District of Oregon.*

NORTH STAR LUMBER COMPANY, a corporation,

Plaintiff,

vs.

JOHN W. JOHNSON, HERMAN WINTERS and
JOHN WINTERS,

Defendants.

The answer of North Star Lumber Company, the plaintiff, to the cross bill of the defendant John W. Johnson.

The plaintiff North Star Lumber Company, saving and reserving unto itself the benefit of all the exceptions to the errors and imperfections in said cross bill contained, for answer to so much thereof as it is advised it is necessary or material for it to answer unto, does aver and say:

I.

That it is not true that the said cross complainant John W. Johnson is the owner in fee of the said lands

described in the complaint herein and in said cross complaint.

II.

Plaintiff admits that on the first day of April, 1907, said defendant John W. Johnson attempted to commence an action in the Circuit Court of the State of Oregon, for Douglas County, in which he was plaintiff and Aaron Johnson and Eline Engebritson were defendants, upon a promissory note alleged to have been made and executed by said Aaron Johnson; but plaintiff denies that said action was ever in fact commenced, for the reason that no service of summons was ever had or made therein upon either of the defendants in said action, and further alleges that on the date of the issuance of the pretended writ of attachment and the levy thereon issued in said cause, the said Aaron Johnson had no right, title or interest whatsoever in or to the said real property or any part thereof; and plaintiff denies that thereby, or otherwise, the said Court acquired jurisdiction of the said property, and denies that the said property was thereby or otherwise attached, and denies that said attachment took effect or held said property on the 8th day of April, 1907, or any time.

III.

And plaintiff denies that said cause came on regularly or at all for trial or judgment in the Circuit Court of the State of Oregon, for Douglas County, and denies that judgment was found or entered in favor of the said cross complainant John W. Johnson, by the terms whereof it was adjudged that the said

John W. Johnson should have and recover a money judgment against the said Aaron Johnson, or against the said Eline Engebritson, or otherwise, or at all, and denies that in said action it was adjudged that the said real property should be sold or was held that said property was subject to the pretended attachment levied thereon; but plaintiff, the North Star Lumber Company, alleges the truth in this regard to be, that the said Circuit Court of the State of Oregon, for Douglas County, never acquired or had jurisdiction in said action, either of the person of either of the defendants therein or of the said real property, to render any judgment whatsoever; that no service of summons therein, either personally or by publication, or otherwise, was ever made upon either of the said persons named as defendants therein; that neither of said defendants was at the time of the bringing of said action found or served with summons in anywise within the State of Oregon, or ever appeared or answered in said action; that a pretended service by publication of summons was made therein, but that said pretended service was wholly void and ineffective for the reasons following, to wit: That neither of the defendants therein, Aaron Johnson or Eline Engebritson, had any property within the State of Oregon, and that it was never made to appear in said Court and cause by affidavit to the satisfaction of the Court or Judge thereof, or judge authorized to grant the order for publication of summons, that the defendants therein named could not, after due diligence, be found within the State of Oregon; that no affidavit show-

ing or attempting to show such fact was filed in said Court and cause or presented to the Court therein, and that the Court had no evidence before it in said cause by affidavit upon which to grant any order for service of summons by publication; that the only paper therein attempting or purporting to show by affidavit that said defendants, or either of them, could not be found within the State of Oregon was a certain pretended affidavit not sworn to before, nor attested by, any person authorized under the laws of the State of Oregon to administer oaths or to take or authenticate affidavits, to wit, a certain pretended affidavit made by the plaintiff in said action, John W. Johnson, the defendant herein, in the County of Chelalis, and State of Washington, at Hoquiam in said State, on the 7th day of September, 1907, before one Charles W. Hodgdon a Notary Public for the State of Washington, whereas by the law of the State of Oregon then in force, being Section 819 of Ballinger and Cotton's Annotated Codes and Statutes of Oregon, it is provided that

An affidavit or deposition taken in another state of the United States or a territory thereof, the District of Columbia, or in a foreign country, otherwise than upon commission, must be authenticated as follows, before it can be used in this state:

1. It must be certified by a commissioner appointed by the governor of this state to take affidavits and depositions in such other state, territory or district or country; or

2. It must be certified by a judge of a court having a clerk and a seal, to have been taken and subscribed before him, at a time and place therein specified, and the existence of the court, the fact that such judge is a member thereof, and the genuineness of his signature shall be certified by the clerk of the court, under the seal thereof;

and the plaintiff alleges that said pretended affidavit was and is null and void and of no effect whatsoever in said cause; and the plaintiff further alleges that on the 9th day of September, 1907, a pretended order for publication of summons in said action was made by the Honorable G. W. Wonacott, County Judge for Douglas County, Oregon, but that no publication was in fact made thereon; and that no further or other order that summons be served by publication in said cause was made therein, but that a pretended order thereof, never signed by any judge, was filed in said court on or about the 11th day of October, 1907, which said pretended order was void and of no effect because not signed, and because there was not at the time of the making thereof, or at all, filed or presented in said cause any affidavit showing that the said defendants could not after due diligence be found within the State of Oregon, the only paper pretending to be an affidavit showing said fact presented in said cause being the said pretended affidavit hereinbefore mentioned, which was filed therein on or about the 9th day of September, 1907; and that the said court, at the time the said pretended order for publication

was made, had before it no proof by affidavit whatsoever that the said defendants could not be found within said State of Oregon at said time, or otherwise. That thereafter and beginning on the 14th day of October, 1907, and for six consecutive weeks, a pretended summons in said action was published; and that no other service or attempted service of summons therein was ever made than said publication, which said service by publication, plaintiff alleges was wholly null and void by reason of the fact that the said court never had before it any evidence by affidavit that the defendants therein could not, after due diligence, be found within the State of Oregon, and for the other reasons aforesaid.

IV.

Plaintiff denies that thereafter, in due course, or at all, an order of sale was made, and denies that an execution was issued and in due course a sale was had of the property involved herein, and denies that at said time and place, or at any time or at all, the defendant John W. Johnson, cross complainant herein, purchased said real property, or that such sale was confirmed; but plaintiff, answering said cross bill, alleges the truth in this regard to be, that no valid attachment or judgment was ever made or given in said action; that neither the said Aaron Johnson nor the said Eline Engebritson, had or owned, or appeared of record to have or own, or pretended or held himself or herself out as having or owning any right, title or interest whatsoever in or to the said real property, or any part thereof, at the time of either or any of

said pretended proceedings.

V.

Plaintiff admits that B. Fenton, Sheriff of said County of Douglas, State of Oregon, did make and issue a pretended sheriff's deed of the said real property, and that the same was recorded; but denies that by reason thereof, or any of the foregoing facts, or at all, the said defendant and cross complainant John W. Johnson became or now is the owner in fee simple or at all of the said real property, the Northwest quarter of Section ten (10), in Township Twenty-one (21) South, Range Seven (7) West, of the Willamette Meridian, in Douglas County, State of Oregon, or any part thereof, and denies that the plaintiff, the North Star Lumber Company, falsely or without right claims to be the owner thereof, and denies that the said plaintiff has no interest, nor right, nor title to the said real property; but plaintiff alleges that it is the owner thereof in fee simple as alleged in the bill of complaint herein.

And having thus fully made answer to said cross bill, plaintiff prays for the relief demanded in the prayer of the original bill herein; and for such other and further relief as in equity may be meet and proper; and that the said cross bill may be dismissed.

VEAZIE & VEAZIE,

Solicitors for Plaintiff.

[Endorsed]: Answer to Cross Bill. Filed September 30, 1911.

G. H. MARSH,

Clerk.

And afterwards, to wit, on Friday, the 15 day of March, 1912, the same being the 15 Judicial day of the Regular March, 1912, Term of said Court; Present: the Honorable R. S. BEAN, United States District Judge presiding, the following proceedings were had in said cause, to-wit:

[Minutes of Trial—March 15, 1912.]

*In the District Court of the United States for the
District of Oregon.*

NORTH STAR LUMBER CO.,

v.

JOHN W. JOHNSON, et al.

No. 3719.

March 15, 1912.

This cause came on regularly at this time for final hearing; James N. Davis and A. L. Veazie appearing on behalf of complainant and F. L. Morgan and John Van Zant appearing on behalf of defendant; and thereupon F. F. Williams is sworn and examined and documents introduced on behalf of complainants and thereupon defendants move to dismiss and thereupon argument ordered deferred until close of evidence and thereupon J. W. Johnson sworn and examined and documents introduced on behalf of defendants and thereupon defendant rests and thereupon, the evidence being closed, after argument of counsel for respective parties cause ordered submitted and thereupon it is Ordered that defendants file and serve their brief within 7 days from the date hereof and that complainant file its reply brief within 7 days from

date of service of defendants' brief.

And afterwards, to wit, on the 15 day of April, 1912, there was duly filed in said Court, an Opinion, in words and figures as follows, to wit:

[Opinion of the Court.]

*In the District Court of the United States for the
District of Oregon.*

NORTH STAR LUMBER COMPANY, a corporation,

Plaintiff,

vs.

JOHN W. JOHNSON, et al,

Defendant.

No. 3719

JAMES N. DAVIS and VEAZIE & VEAZIE, Attorneys for Plaintiff.

MORGAN & BREWER, Attorneys for Defendants.

BEAN, D. J.

This is a suit to quiet title to certain real property in this state which, it is alleged in the bill and admitted by the answer, is vacant unoccupied land and not in the possession of either party to the suit, or any other person. Both parties deraign title through Aaron Johnson, the plaintiff by deed from Aaron Johnson to Andrew Johnson dated May 21, 1904, and recorded June 7th, of the same year; deed from Andrew to Aaron of date April 8, 1907, and recorded the 24th of the same month; a deed from Aaron to plaintiff of date February 21, 1907, and recorded April

24th. The defendant claims through a sheriff's deed, made in pursuance of a sale under an execution issued on a judgment recovered in the state court, by the defendant against Aaron Johnson, a non-resident of the state, in an action at law commenced on April 1, 1907, and the attachment of the property in suit on that date as the property of Aaron, and the subsequent service of summons upon him by publication. The defendant by cross bill affirms the validity of the judgment, sale thereunder, and the sheriff's deed, and asks to have his title quieted. It thus appears that the plaintiff is the owner of the property in controversy unless the defendant acquired title through the sheriff's deed. The plaintiff insists that the judgment under which the defendant claims is void and of no effect because (1) the defendant therein, Aaron Johnson, had no title or interest in the property attempted to be seized under the attachment at the time of the levy but that the title was then in Andrew Johnson. (2) That jurisdiction of Aaron Johnson in the action brought against him by the defendant in the state court was never acquired because the affidavit for an order for the publication of summons in such action was of no effect since it was made outside of the state and not before any officer or person authorized by the law to take the same. The defendant challenges the jurisdiction of the court to determine any of these questions because (1) the plaintiff has a plain, speedy and adequate remedy at law by an action in ejectment. And (2) that the federal court will not assume jurisdiction to declare a judgment or

decree of a state court void for error or irregularity appearing on its face.

First: At common law an action in ejectment could be brought only against some person in the actual possession of the property, but under the Oregon Statutes (Sec. 325, Lord's Ore. Laws) an action to recover real property, which takes the place in this state of an action of ejectment, may be brought against a person acting as the owner thereof where the property is not in the actual possession of anyone. It is averred in the bill, admitted in the answer and conceded at the hearing that the land in controversy is vacant and there is no evidence or claim that it has ever been improved or cultivated by the defendant or that he has exercised any control over it, and therefore he was not acting as the owner within the meaning of the section referred to, and a suit to determine an adverse claim could be maintained in a court of equity under the Oregon Statute. *McLeod v. McLeod*, 43 Ore. 260.

Second. It may be conceded that a federal court has not jurisdiction at the suit of a party to vacate or annul a judgment or decree of a state court for error or irregularity appearing on the face of the record. (*Natl. Surety Co. vs State Bank*, 120 Fed. 593.) But it has jurisdiction to entertain a bill to quiet title to real property or remove a cloud therefrom where the requisite diversity of citizenship exists. This has been, from time immemorial, one of the well known functions of a court of equity where the remedy at law was inadequate and in such a suit the court may

inquire into the jurisdiction of a state court to render a judgment or decree which is relied upon and brought before the court by a party claiming the benefit thereof. (*Holland v. Challen*, 110 U. S. 15; *Sharon vs. Tucker*, 144 U. S. 533; *American Assn. vs. Williams*, 166 Fed. 17; *Bigelow vs. Chatterton*, 51 Fed. 614; *Sanders vs. Devereaux*, 60 Fed. 311; *Williamson vs. Berry*, 8 How. 495-540.) The statutes of Oregon authorize any person claiming an interest in real estate not in the actual possession of another to maintain a suit against another who claims an interest or estate therein adverse to him, for the purpose of determining such conflicting or adverse claim. (Sec. 516 *Lord's Ore. Laws*.) And this right may be asserted and enforced in the federal court where there exists the requisite diversity of citizenship or some other ground of equitable jurisdiction, and where it is alleged and proved that both parties are out of possession. (*Holland v. Challen supra*; *Whitehead v. Shattuck*, 138 U. S. 146; *Wehrman vs. Conklin*, 155 U. S. 314.)

Coming then to the merits, and passing the question as to the validity of the attachment in the action under which the defendant claims and assuming that it was sufficient to authorize the court to proceed in the action, it did not confer jurisdiction to render any judgment which could be enforced against the attached property. The attachment was merely auxiliary to the main action and had nothing to do with the merits of the case or the jurisdiction of the court to try and determine it. By the ruling in *Pennoyer*

vs. Neff (95 U. S. 714) proceeding in an action against a non-resident is ineffectual unless some property of the defendant is brought within the control of the court and subject to its disposition by writ of attachment, but the right in Oregon to adjudicate thereon is acquired not by the attachment and publication thereof, as was the case in *Cooper vs. Reynolds* (10 Wall. 308) but by the service of summons upon the defendant either in person or by publication. It is the service of the summons and not the seizing of his property that gives the court jurisdiction to establish by its judgment a demand against a non-resident and to subject his property, brought within its control by attachment, to the payment of such demands. (*Bank of Colfax vs. Richardson*, 34 Ore, 518.)

It appears from the record that the defendant in the case of *Johnson vs. Johnson* was a non-resident of the state. Service of summons was attempted to be made upon him by publication. Publication, under the Oregon Statute can be legally had only by an order of the court or judge thereof. No such order can be made unless the requisite facts are made to appear to the satisfaction of the court or judge by affidavit. (Sec. 56 Lord's Ore. Laws.) The affidavit is therefore an essential requisite to a valid order for a publication of summons. Without it there is no foundation upon which to base such an order. There is nothing upon which the court is authorized to act. In short there is no jurisdiction to, act at all. *Galpin vs. Page*, 18 Wall. 350-359-372; *Cohen v. Portland Lodge B. P. O. E.*, 152 Fed. 375; 144 Cal. 786. Now, the af-

fidavit upon which the publication is alleged to have been founded in this case was made in the state of Washington before a Notary Public of that state, and was not otherwise authenticated. The Statute of Oregon then in force (Sec. 819 B. & C. An. Laws), required that an affidavit taken in another state, before it can be used here must be certified by a Commissioner appointed by the governor to take affidavits and depositions in such state, or by a court having a seal and clerk. The affidavit in question was not so authenticated. It was therefore a nullity, and the order of publication based thereon was ineffectual for any purpose. (*Fawcett v. Chi. RR Co.*, 113 Tenn. 246; 81 S. W. 839; *Scull v. Alten*, 16 N. J. Law, 147; *Murdock vs. Hilyer*, 45 No. Ao. 292; *Brunswick Hdw. Co. vs. Brigham*, 33 S. E. 56.) It is claimed, however, by the defendant that this is a collateral attack upon the judgment and since it recites that it appears to the satisfaction of the court that the defendant was "duly served with summons" it will be presumed in this proceeding that proper service was in fact made although not shown by the record, but no such presumption will be indulged in where, as here the court was proceeding against a party not within its territorial jurisdiction upon a service by publication, and the record discloses that an essential step necessary to such service, was entirely omitted. *Galpin v Page*, *supra*.

I conclude therefore that the judgment under which the defendant claims is void and that the plaintiff is entitled to a decree as prayed for.

[Endorsed]: Opinion. Filed Apr. 15, 1912.

A. M. CANNON,
Clerk U. S. District Court.

And afterwards, to wit, on the 17 day of April, 1912,
there was duly filed in said Court, a Decree, in
words and figures as follows, to wit:

[Decree.]

*In the District Court of the United States for the
District of Oregon.*

NORTH STAR LUMBER COMPANY, a corpora-
tion,

Plaintiff,

vs.

JOHN W. JOHNSON, HERMAN WINTERS and
JOHN WINTERS,

Defendants.

This cause came on to be heard at this term and
was argued by counsel; the defendants Herman
Winters and John Winters having been duly served
with process by subpoena and having made default
herein, the plaintiff and the defendant John W. John-
son, appearing by their Counsel; and thereupon, upon
consideration thereof:

IT WAS ORDERED, ADJUDGED AND DE-
CREED as follows, to wit:

That the plaintiff North Star Lumber Company, a
corporation under the laws of the State of Minne-
sota, was at the time of bringing this suit and is now
the owner in fee simple of that certain real proper-
ty, situate in Douglas County, State of Oregon,

known and described as the Northwest quarter (NW¼) of Section ten (10) Township twenty-one (21) South, Range seven (7) West of the Willamette Meridian; that the plaintiff holds and owns the said real property free and clear from all claim of said defendants and each of them; and that the said defendants and each of them be and they are hereby restrained and enjoined from hereafter setting up any claim or title to the said lands, or any part thereof, or any lien upon the same, or any part thereof, and from in any manner meddling therewith or removing any timber or product therefrom; and the title of the plaintiff to the said real property is hereby quieted against the alleged claims of the defendant John W. Johnson and of each of the other defendants herein, and that the said defendant John W. Johnson in particular is decreed to have no interest in the said real property, or any part thereof.

And that certain deed bearing date the 20th day of November, 1909, made and executed by B. Fenton, Sheriff of the County of Douglas, State of Oregon, and recorded on the 20th day of November, 1909, in Book 66 of Deeds of Douglas County, on pages 364 and 365, purporting to convey the said real property to the said defendant John W. Johnson, is hereby canceled and annulled and held for naught.

AND IT IS FURTHER ORDERED AND ADJUDGED, that the plaintiff North Star Lumber Company do have and recover of and from the defendant John W. Johnson its costs and disbursements herein, taxed at \$.....

Dated at Portland, Oregon, this 17 day of April, 1912.

R. S. BEAN,
Judge.

[Endorsed]: Decree. Filed Apr. 17, 1912.

A. M. CANNON,
Clerk U. S. District Court.

And afterwards, to wit, on the 14 day of November, 1912, there was duly filed in said Court, Testimony and Exhibits, in words and figures as follows, to wit:

[Testimony and Exhibits.]

*In the District Court of the United States for the
District of Oregon.*

NORTH STAR LUMBER COMPANY, a corporation,
Plaintiff,

vs.

JOHN W. JOHNSON, et al,

Defendants.

Portland, Oregon, Friday, March 5, 1912.

Mr. VEAZIE: The plaintiff offers in evidence a transcript of the proceedings in Douglas County, with stipulation of the parties to this suit that the same may be received in evidence, and would ask to have it marked as plaintiff's exhibit.

Mr. MORGAN: No objection.

Marked "Plaintiff's Exhibit 1."

Mr. VEAZIE: The plaintiff also offers in evidence

certified exemplification from the records of Douglas County of the deed of Aaron Johnson to Andrew Johnson, bearing date the 21st day of May, 1904, together with the certificate of the record thereof in Deed Book 49, on pages 158 and 159 of Records of Deeds of Douglas County, Oregon, on the 7th day of June, 1904.

Mr. MORGAN: Subject to our right to show that is nothing more than a fraudulent conveyance, or at most a mortgage.

Marked "Plaintiff's Exhibit 2."

Mr. VEAZIE: The patent in this case, may it please the court, has never been recorded; there is no contention over the patent.

Mr. MORGAN: No, we all claim under the patent.

Mr. VEAZIE: It is stipulated that the lands in question were patented to the Aaron Johnson referred to in the pleadings and the introduction of the patent in evidence is waived by the parties.

We offer in evidence deed of Andrew Johnson and wife to Aaron Johnson, bearing date the 8th day of April, 1907, with certificate or acknowledgement thereon bearing the same date, and the certificate of record thereof in book 57, at page 103, deed records of Douglas County, Oregon, on the 24th day of April, 1907, conveying the same property.

Mr. MORGAN: Not admitting, your honor, that this is anything more than the satisfaction of mortgage, we consent to the introduction of plaintiff's exhibit.

Marked "Plaintiff's Exhibit 3."

Mr. VEAZIE: We offer in evidence, your Honor, the deed of Aaron Johnson to the North Star Lumber Company, the plaintiff in this case, bearing date the 21st day of February, 1907, with the certificate of acknowledgement thereon, bearing date the 8th day of March, 1907, and certificate of record thereof in Deed Book 57, page 103, of the records of Douglas County, Oregon, on the 24th day of April, 1907.

Mr. MORGAN: That, your Honor, is objected to until such time as counsel establishes the date and circumstances of delivery of that deed. I think, your honor, that goes to the objection to the introduction of it.

COURT: Very well.

Marked "Plaintiff's Exhibit 4."

F. F. WILLIAMS, a witness called on behalf of the plaintiff, being first duly sworn, testified as follows:

Direct Examination.

(Questions by Mr. VEAZIE):

Q. Mr. Williams, what is your connection, if any, with the plaintiff corporation?

A. I am their agent in this state—bought their timber for them.

Q. How long have you represented the North Star Lumber Company in its business here?

A. Since some time in 1907.

Q. Were you the agent of the company at the time of the purchase of the land in controversy here?

A. Yes, sir.

Q. Can you state the date when the transaction of

purchase by which the North Star Lumber Company received the deed just introduced in evidence as Plaintiff's Exhibit 4, was made?

A. The deed was left at the First National Bank of Hoquiam, Washington; that is where I paid for it; left my check there.

Q. Do you know when the deed was deposited in the bank?

A. It was in March, the latter part of March.

Q. Can you state the date when the payment was made and the delivery took place?

A. Well, I left a check at the bank on the 28th of March.

Q. Was the deed there at that time

A. Well, it was—it was there a few days after that. I left my check there to pay for the land, and then was out of town; was out in the woods for quite a time, and the deed was delivered to the bank.

Q. The deed. Was the deed delivered during your absence?

A. Yes, sir.

Q. Have you anything that indicates when the bank made the payment

A. I have my cancelled check.

Q. You may produce that. (Witness does so.) This check was signed by you, was it?

A. Yes, sir.

Q. You had a deposit in that bank at that time, did you?

A. Yes, sir.

Q. Was the payment made and charge made

against your account by the bank?

A. Yes, sir.

Q. Do you know the paying stamp of the bank?

A. Yes, sir.

Q. Is that the usual stamp

A. Yes, sir.

Q. Used by the bank on making payments ?

A. Yes, sir.

Mr. VEAZIE: We would offer this simply as a memorandum to fix the date of payment if there is no objection to that. It seems to be the only item of evidence that fixes that precisely.

Marked "Plaintiff's Exhibit 5."

Q. Was that item charged against your account as being paid out on the date the check bears date?

A. Yes, at that time, or within a very short time of it.

Q. What amount was paid as purchase price by the North Star Lumber Company for the land in question?

A. \$2000.00.

Q. What is the land worth at this time

A. Well, from four to five thousand dollars.

COURT: What is the date shown on the check?

Mr. VEAZIE: April 12, 1907.

Q. Do you know about the delivery of the deed from Andrew Johnson to Aaron Johnson, as to whether or not it was placed in the bank at the same time that the other deed was taken up, or not?

A. Well, I think they were both taken up at the same time, and sent down for record.

Q. By whom were the papers recorded, Mr. Williams, or sent for record to Douglas County?

A. I sent them down.

Cross Examination

(Questions by Mr. MORGAN):

Q. Are you a stockholder of the North Star Lumber Company, Mr. Williams?

A. I am not.

Q. Are you their agent here only?

A. Yes, sir.

Q. Do you hold any office with that company?

A. I do not.

Q. Did you make this purchase of land yourself?

A. Yes, I—Mr. Richardson looked this man up for me at Hoquiam.

Q. Mr. John Richardson?

A. John Richardson.

Q. And the transaction was had through the First National Bank?

A. At Hoquiam.

Q. This paper bears date the 21st of February of that year. How do you account for that early date?

A. Well, this man that deeded it at that time was up in Canada and it took some time for the papers to get around, on that account, I think.

Q. Your dealings were with Mr. John Richardson with reference to this land?

A. Yes, he looked up the man. He was there in

Hoquiam all the time, and he looked up these parties —this Johnson.

Q. Then these deeds were gotten together about the 28th of March, you think?

A. Well, I should think it was shortly after the 28th of March.

Q. Shortly after. Now, the deed from Andrew Johnson bears date April 8th, does it not?

A. I don't remember.

Q. Do you remember?

A. I don't remember about that.

Q. Well, does that help to fix your memory as to when the deeds were placed in the First National Bank?

A. I don't quite get.

Q. As to whether they were put in the bank together, that is the two deeds in escrow.

A. Well, I don't know whether they were or not.

Q. You couldn't say as to that?

A. No, I was out of town at that time.

Q. Do you know where Andrew Johnson lived at that time?

A. Andrew?

Q. Yes.

A. No, I don't. He was a resident of Hoquiam for a long time. I don't know where he was just at that time.

Q. Did you have any writing that was deposited with the First National Bank, along with these deeds, to show the terms of the escrow?

A. Well, I don't remember, I presume likely there was.

Q. Let me understand. You put your \$2000.00 in the bank?

A. With instructions to——

Q. To pay for this tract when the deeds came in?

A. Yes, sir—well, I can't tell you just what the instructions were, now. That was the usual instructions to—well, I left a check there and they were to take up the deed; pay the money over to the man who owned the land.

Q. How much of that money was paid to Andrew Johnson?

A. Andrew?

Q. Yes.

A. I didn't know Andrew.

Q. This amount of two thousand dollars which was recited in this deed was the amount that was paid to Aaron?

A. Aaron.

Q. The man who was in British Columbia?

A. Yes, sir.

Q. And that was paid by this check which you have here in evidence?

A. Yes, sir.

Q. Did you pay any sum to Andrew?

A. I did not.

Q. Or pay any to——

A. This \$2000.00 was all I paid for the land.

Q. The bank sent you these deeds, or did you go to the bank and get them?

A. Well, I don't remember about that. Sometimes I was there and got the deeds, and sometimes

they sent them to me, I was out in the woods most of the time at that time, and sometimes they lay there for quite a while before I would get them. It seems that they did in this instance.

Redirect Examination.

Q. Has Aaron Johnson remained in Canada ever since that time?

A. Yes, sir, he is there at the present.

Q. You have had correspondence with him since?

A. Yes, sir.

Q. And know he has remained there?

A. Yes, sir.

Q. You found both deeds at the bank, did you when you got back?

A. They were either both there or sent to me.

Q. Do you know anything about how the \$2,-000.00 was distributed as between the two men, Andrew and Aaron?

A. No, I wouldn't know anything about that; that was left to the bank.

Recross Examination.

Q. Do you know where Andrew Johnson is?

A. Do I know?

Q. Yes.

A. Yes, sir.

Q. What is his place of residence?

A. It is at High Point, Washington.

Q. High Point?

A. High point.

Witness excused.

Mr. VEAZIE: I don't understand you raise any question as to our corporate organization.

Mr. MORGAN: No, no.

Plaintiff Rests.

Mr. MORGAN: At this time, your Honor, we move to dismiss this action, first, for want of equitable jurisdiction. We base this upon the ground that under the statutes of the State of Oregon, there is a plain and speedy and adequate remedy at law for this proceeding, one that is open to the plaintiff, either in the state court or in this court, and for that reason we move for dismissal on the ground of lack of equitable jurisdiction. We also move for its dismissal for want of equity in this, that the plaintiff has wholly failed to establish an equitable right, or right to equitable relief. Perhaps these matters had better be argued in toto but I desire to preserve this objection at this time, but I will just point out to the court this: that under a long line of decisions in the federal courts, the federal courts will not grant equitable relief if there is any legal relief even though, in the practice in the state court, either remedy might have been resorted to. And in support of the second proposition, I desire to point out to the court that through a long line of decisions in the United States Courts, they decline to grant equitable relief where the only ground for such relief is founded upon what is claimed to be a void judgment of a state court, in the absence of a showing of a mistake. I have a long line of decisions, but I take it your Honor would hear the testimony.

COURT: Yes, hear your testimony on the merits.

Mr. MORGAN: A portion of the record has been introduced by the plaintiff, but under the stipulation it was provided that certain other matters which occurred in that court since June 3, 1911, by way of correcting some clerical errors in that record might be added, and; we offer these as a part of the record of the Oregon Court, under the stipulation.

Mr. VEAZIE: May it please the Court, we object to this as immaterial and irrelevant and as matters occurring subsequent to the bringing of this suit. We make no objection on account of the form in which they are certified.

COURT: Admitted subject to your objection.

Two papers offered and marked as "DEFENDANT'S EXHIBITS A and B."

Mr. MORGAN: We offer in evidence, your Honor, the original deed from the Sheriff of Douglas County to John W. Johnson, the defendant here.

Mr. VEAZIE: We object to it, your Honor, on the ground that it appears from the evidence here that the proceedings upon which the said deed is based were null and void and that the deed is itself, therefore, void and of no effect.

COURT: It will go in the record, subject to your objection.

Marked "Defendant's Exhibit C."

JOHN W. JOHNSON. The defendant in the case being first duly sworn, testified in his own behalf, as follows:

Direct Examination.

(Questions by Mr. MORGAN):

Q. Where do you live, Mr. Johnson?

A. Hoquiam.

Q. What is your occupation?

A. What?

Q. What is your business?

A. I am foreman in a sash and door factory.

Q. You are the defendant in these proceedings?

A. Yes, sir.

Q. At the time this suit was brought by you in Douglas County against Aaron Johnson and Eline Engebritson, did you at that time know that the North Star Lumber Company had any interest in this property

A. No, I didn't know anything about it.

Q. How long after that was it that you found out that they had or claimed some interest in this property

A. Oh, I don't know; about probably a year and a half or something.

Cross Examination.

(Questions by Mr. VEAZIE):

Q. Have you ever seen the property

A. No, I never seen it.

Witness excused.

Mr. MORGAN: Now, I desire to offer in evidence, so that it may be made a part of the record certain of the statutes of the State of Oregon with reference to attachments and recording deeds.

COURT: The court will take judicial knowledge of those.

Mr. MORGAN: With that understanding, we will rest.

Defense rests.

[Endorsed]: Testimony. Filed Nov. 14, 1912.

A. M. CANNON,
Clerk U. S. District Court.

[Plaintiff's Exhibit 1.]

*In the District Court of the United States for the
District of Oregon.*

NORTH STAR LUMBER COMPANY,

Plaintiff,

vs.

JOHN W. JOHNSON, et al.,

Defendants.

It is stipulated and agreed between the plaintiff and the defendant John W. Johnson, as follows:

1. That the order for publication of summons in the case of John W. Johnson vs. Aaron Johnson and Eline Engebritson, in the Circuit Court of the State of Oregon for Douglas County, bearing date the 11th day of October, 1907, copy of which was shown in the transcript filed as an exhibit at the trial of the above entitled cause to be without signature, was as shown by the journal of said Court in fact signed by J. W. Hamilton, Judge of said Court.

2. That F. F. Williams, called as a witness at the trial of this suit on behalf of the North Star Lumber Company, shall be deemed to have testified therein

that the North Star Lumber Company had no knowledge of the fact that the said action in Douglas County, State of Oregon, had been brought or that said real property had been attached therein, or that any judgment had been rendered therein, or any sale made thereunder until within about thirty days prior to the bringing of the suit of the North Star Lumber Company vs. John W. Johnson, et al., in this Court above entitled.

VEAZIE & VEAZIE,

Solicitors for Plaintiff.

JOHN VAN ZANTE,

of Solicitors for Defendant John W. Johnson.

*In the District Court of the United States for the
District of Oregon.*

NORTH STAR LUMBER COMPANY, a corporation,
Plaintiff,

vs.

JOHN W. JOHNSON, HERMAN WINTERS and
JOHN WINTERS,

Defendants.

STIPULATION.

Subject to the right of either party to show any additional matters occurring since June 3rd, 1911.

It is hereby stipulated and agreed between the plaintiff, North Star Lumber Company, and the defendant John W. Johnson, that the accompanying transcript of papers from the records and files of the

Circuit Court of the State of Oregon for the County of Douglas, in the case of John W. Johnson plaintiff, against Aaron Johnson and Eline Engebritson, defendants, prepared and certified to by E. H. Lenox, County Clerk, by Blanche Reed, deputy clerk, with the seal of said court attached, under date of June 3rd, 1911, shall be filed and received in evidence at the trial of the above entitled cause now pending between the North Star Lumber Company and the said defendant John W. Johnson, in the District Court of the United States for the District of Oregon, as containing and comprising a true and correct record and transcript of all the papers filed and proceedings had in said Circuit Court of the State of Oregon for Douglas County in said entitled action, and without objection thereto on account of the manner in which the same is certified; and on the trial of said cause either party hereto may have the benefit of said transcript.

Dated at Portland, Oregon, this 9th day of March, 1912.

NORTH STAR LUMBER COMPANY,

By VEAZIE & VEAZIE,

Attorneys for Plaintiff.

JOHN W. JOHNSON,

By

MORGAN & BREWER and JOHN VAN ZANTE,

Attorneys for Defendant John W. Johnson.

Filed Mar. 15, 1912.

A. M. CANNON,

Clerk U. S. District Court.

*In the Circuit Court of the State of Oregon
for Douglas County.*

JOHN W. JOHNSON,

Plaintiff,

vs.

AARON JOHNSON and ELINE ENGBRITSON,
Defendants.

Plaintiff for cause of action against the Defendants complains and alleges:

That on the 2nd day of March, at Hoquiam, Washington, the defendants, for value received, made, executed and delivered to the Plaintiff, their certain promissory note, wherein and whereby they promised jointly and severally to pay to Plaintiff the sum of Two Hundred Seventy-five (275.00) Dollars in monthly installments of Twenty (20.00) Dollars per month, beginning April 1, 1904, with interest from date at the rate of Eight (8) per cent per annum; and if not paid as therein specified, the whole sum of both principal and interest should become immediately due and collectable at the option of the holder of the note, and further promised in and by said promissory note, to pay to Plaintiffs a reasonable sum as attorneys' fees in case suit or action should be instituted to collect said note or any part thereof;

That no payments have been made on said note, except the sum of Twenty (20.00) Dollars paid April 8, 1904, and the further sum of Twenty (20.00) Dollars paid May 10, 1904;

That Thirty (30.00) Dollars is a reasonable attor-

ney fee for instituting this action for the collection of said note ;

That there is now due and owing from the Defendants to the plaintiffs, the full sum of Two Hundred Seventy-five (275.00) Dollars with interest thereon at the rate of eight (8) per cent per annum, from the 2nd day of March, 1904, less the sum of Twenty (20.00) Dollars paid April 8, 1904, and the further sum of Twenty (20.00) Dollars paid May 10, 1904; and also due from Defendants to Plaintiff, the further sum of Thirty (30.00) Dollars, as attorney's fees for instituting this action for the collection of said note.

WHEREFORE Plaintiff demands judgment against the Defendants and each of Defendants for the full sum of Two Hundred Seventy-five (275.00) Dollars, in Gold Coin of the United States of America together with interest thereon in like Gold Coin from the 2nd day of March, 1904, at the rate of Eight (8) per cent per annum, less the sum of Twenty (20.00) Dollars paid April 8, 1904, and the further sum of Twenty (20.00) Dollars paid May 10, 1904; and Plaintiff further demands judgment against the Defendants for the further sum of Thirty (30.00) Dollars, attorneys fees, and Plaintiffs' costs and disbursements herein to be taxed.

COSHOW & RICE,
Attorneys for Plaintiff.

STATE OF OREGON,
County of Douglas—ss.

I, O. P. Coshow, being first duly sworn, say that I

am one of Plaintiff's attorneys in the above entitled action; that the foregoing complaint is true as I verily believe; that I make this verification for the reason that I am such an attorney and that this action is founded upon a written instrument for the payment of money only, and said written instrument is in my possession.

O. P. COSHOW.

Subscribed and sworn to before me this 1st day of April, 1907.

Z. N. AGEE,
County Clerk.

(Endorsed on the back as follows:—)

*In the Circuit Court of the State of Oregon
for Douglas County.*

JOHN W. JOHNSON,

Plaintiff,

vs.

AARON JOHNSON and ELINE ENGBRITSON,
Defendants.

COMPLAINT.

Filed this 1st day of April, A. D., 1907.

Z. N. AGEE,
Clerk.

By E. H. Lenox, Deputy.
COSHOW & RICE,
Attorneys for Plaintiff.

*In the Circuit Court of the State of Oregon
for the County of Douglas.*

JOHN W. JOHNSON,

Plaintiff,

vs.

AARON JOHNSON and ELINE ENGBRITSON,

Defendants.

AFFIDAVIT FOR ATTACHMENT.

STATE OF OREGON,

County of Douglas—ss.

I, O. P. Coshow, being duly sworn, say that the Defendants above named are indebted to the above named Plaintiff in the sum of Two Hundred Seventy-five Dollars, with annual interest at 8 per cent from March 2nd 1904, less \$20 paid April 8th, 1904, and \$20, paid May 10th 1904, besides attorneys' fees, etc., over and above all legal setoffs and counter claims, upon an express contract for the direct payment of money, and that the payment of the same has not been secured by any mortgage, lien or pledge upon real or personal property.

That the said sum of Two Hundred Seventy-five Dollars, for which the attachment is asked, is an actual, bona fide existing debt, due and owing from the Defendants to the Plaintiff, and that this attachment is not sought, and this action is not prosecuted to hinder, delay or defraud any creditors of the Defendant, That I make this affidavit for and behalf of plaintiff for the reason that plaintiff is not in this state and I am his attorney.

O. P. COSHOW,

Subscribed and sworn to before me, this 1" day of April, A. D., 1907. As witness my hand and official seal.

[Seal.]

Z. N. AGEE,
County Clerk.

(Endorsed on the back is the following:—)

*In the Circuit Court of the State of Oregon
for the County of Douglas.*

AFFIDAVIT FOR ATTACHMENT.

JOHN W. JOHNSON,
Plaintiff,
AARON JOHNSON, ET AL.,
Defendants.

Filed Apr. 1, 1907.

Z. N. AGEE,
County Clerk.

*In the Circuit Court of the State of Oregon
for the County of Douglas.*

JOHN W. JOHNSON,

Plaintiff,

vs.

AARON JOHNSON and ELINE ENGEBRITSON,
Defendants.

UNDERTAKING FOR ATTACHMENT. ..

WHEREAS, a certain action has been commenced in the Circuit Court of the State of Oregon, in and for the County of Douglas, wherein John W. Johnson is Plaintiff and Aaron Johnson and Eline Engebritson are Defendants, for the recovery of Two Hundred

Seventy-five Dollars, with annual interest at 8 per cent besides attorneys fees and disbursements and the Plaintiff is about to apply for an attachment against the property of the Defendant as security for the satisfaction of such judgment as he may recover against said Defendant.

NOW, THEREFORE, We, John W. Johnson as principal and residing at Roseburg in the County of Douglas by occupation a banker, as surety are jointly and severally bound in the sum of three hundred Dollars, and undertake in the said sum that the Plaintiff will pay all costs that may be adjudged to the Defendants, and all damages which they may sustain by reason of the attachment, if the same be wrongful or without sufficient cause, not exceeding the said sum of Three Hundred Dollars.

JOHN W. JOHNSON,

By O. P. Coshow, his Attorney.

T. R. Sheridan,

STATE OF OREGON,

County of Douglas—ss.

T. R. Sheridan, whose name is subscribed as the surety to the above undertaking, being severally duly sworn each for himself, says: That I am a resident and free holder within the State of Oregon, and am worth the sum of Six Hundred Dollars, over and above all my just debts and liabilities, exclusive of property exempt from execution, and that I am neither an Attorney, Clerk, Sheriff or other officer of any Court.

T. R. SHERIDAN,

Subscribed and sworn to before me this 1st day of April, A. D., 1907.

[Seal.]

O. P. COSHOW,
Notary Public for Oregon.

(Endorsed on the back is the following:—)

*In the Circuit Court of the State of Oregon
for the County of Douglas.*

UNDERTAKING FOR ATTACHMENT.
JOHN W. JOHNSON,

Plaintiff,

AARON JOHNSON, et al,

Defendants.

Filed Apr. 1, 1907,

Z. N. AGEE,
County Clerk.

*In the Circuit Court of the State of Oregon
for the County of Douglas.*

JOHN W. JOHNSON,

Plaintiff,

vs.

AARON JOHNSON and ELINE ENGBRITSON,
Defendants.

I, H. T. McClallen, Sheriff of Douglas County, Oregon, do hereby certify that by virtue of a Writ of Attachment, duly issued out of the above named Court and cause, on the 1st day of April, 1907, and to me directed and delivered, on the 1st day of April, 1907, did, at the suit of said Plaintiff in said action, in said County and State, on the 1 day of April, 1907,

duly attach all the right, title and interest the said Defendant or either of them had, on the 1st day of April, 1907, or at any time thereafter, in or to the following described real property, to wit:

NW¼ Sec. 10, Township 21 S., of R. 7 W., W. M., Douglas County, Oregon.

H. T. McCLALLEN,

Sheriff.

By.....Deputy.

(Endorsed on the back is the following:—)

CERTIFICATE OF ATTACHMENT.

*In the Circuit Court State of Oregon
for Douglas County.*

JOHN W. JOHNSON,

Plaintiff,

vs.

AARON JOHNSON and ELINE ENGEBRITSON,

Defendants.

Filed the 1st day of April, 1907.

Z. N. AGEE,

County Clerk.

E. H. Lenox, Deputy.

2:15 P. M.

Vol. 3, P. 332.

*In the Circuit Court of the State of Oregon
for the County of Douglas.*

JOHN W. JOHNSON,

Plaintiff,

vs.

AARON JOHNSON and ELINE ENGEBRITSON,
Defendants.

To Aaron Johnson and Eline Engebritson, the above
named Defendants:

IN THE NAME OF THE STATE OF OREGON: You are hereby required to appear and answer the complaint filed against you in the above entitled action within ten days from the date of the service of this summons upon you; if served within this County; or if served in any other County of this State, then within twenty days from the date of the service of this summons upon you; and if you fail to answer, for want thereof, the Plaintiff will take judgment against you for the sum of Two Hundred Seventy-five (275.00) Dollars, in Gold Coin of the United States, together with interest thereon in like Gold Coin from the 2nd day of March, 1904, at the rate of Eight (8) per cent per annum, less the sum of Twenty (20.00) Dollars paid April 8, 1904 and the further sum of Twenty (20.00) Dollars paid May 10, 1904; and the Plaintiff further demands judgment against the Defendants for the further sum of Thirty (30.00) Dollars, attorneys' fees, and Plaintiff's costs and disbursements herein to be taxed.

COSHOW & RICE,
Attorneys for Plaintiff.

STATE OF OREGON,
County of Douglas—ss.

I HEREBY CERTIFY that I have received the
within SUMMONS, within the County of Douglas,

State of Oregon, on the 1st day of April, 1907, and after due and diligent search and inquiry I have herewith return that I have been unable to find the said Aaron Johnson and Eline Engebritson within the County and State.

H. T. McCLALLEN,

Sheriff of Douglas County, Oregon.

By H. C. Slocum, Deputy.

Dated this 8th day of May, 1907.

(Endorsed on the back of Summons is the following:—)

*In the Circuit Court of the State of Oregon
for the County of Douglas.*

SUMMONS.

JOHN W. JOHNSON,

Plaintiff,

vs.

AARON JOHNSON and ELINE ENGBRITSON,
Defendants.

Received Apl. 1", 1907.

H. T. McCLALLEN,

Sheriff of Douglas County.

COSHOW & RICE,

Attorneys for Plaintiff.

Filed May 8, 1907, at 11:30 o'clock A. M.

Z. N. AGEE,

County Clerk.

By E. H. Lenox, Deputy.

*In the Circuit Court of the State of Oregon
for the County of Douglas.*

JOHN W. JOHNSON,

Plaintiff,

vs.

AARON JOHNSON and ELINE ENGEBRITSON,
Defendants.

TO THE SHERIFF OF DOUGLAS COUNTY,
GREETING:

WHEREAS, The above named plaintiff has filed a complaint, with affidavit and undertaking for an Attachment to issue in the above entitled cause and Court, therefore,

IN THE NAME OF THE STATE OF OREGON,
You are hereby commanded to attach and safely keep all property, real and personal, of Aaron Johnson and Eline Engebritson, the defendants above named, within your County, not exempt from execution, or so much thereof as may be necessary to satisfy the demand of John W. Johnson, Plaintiff above named, amounting to Two hundred seventy-five dollars,, Dollars and interest thereon, at the rate of 8 per cent per annum from the 2 day of March, 1904, less sum of Twenty (20.00) paid April, 8, 1904, and the further sum of \$20.00 paid paid May 10, 1904, and plaintiff demands the further sum of \$30.00 Atty's fee, together with the costs and disbursements. And of this Writ make legal service and return.

IN WITNESS WHEREOF, I Have hereunto set my hand and affixed the seal of the Circuit Court, above named, this 1st day of April, 1907.

[Seal.]

Z. N. AGEE,
Clerk Circuit Court.

STATE OF OREGON,

County of Douglas—ss.

I hereby certify that I received the within named Writ of Attachment on the 1st day of April, 1907, and executed the same on the 1st day of April, 1907, in Douglas County, Oregon, by levying upon and attaching at the suit of the within named John W. Johnson Plaintiff herein, all the right title and interest of the within named Aaron Johnson and Eline Engebritson, defendant herein, in and to the real or personal property, situated in said Douglas County, Oregon, described as follows:

NW $\frac{1}{4}$ of Section 10, Township 21 S., of R. 7 W., W. M., Douglas County, Oregon.

And that I have levied upon and attached the same, by making and delivering to the County Clerk of said Douglas County, a certificate containing the title of the cause, the name of the parties to the action, a description of said real property as above set forth and a statement that the same was attached at the suit of the plaintiff.

....

H. T. McCLALLEN,

Sheriff of Douglas County, Oregon

By.....Deputy.

(Endorsed on the back of Writ of Attachment is the following:—)

*In the Circuit Court of the State of Oregon
for the County of Douglas.*

WRIT OF ATTACHMENT.

JOHN W. JOHNSON,

Plaintiff,

vs.

AARON JOHNSON and ELINE ENGBRITSON,
Defendants.

Filed May 8, 1907, at 11 o'clock A. M.

Z. N. AGEE,

County Clerk.

E. H. Lenox, Deputy.

*In the Circuit Court of Douglas County,
State of Oregon.*

BE IT REMEMBERED, That at a regular term of the Circuit Court of the State of Oregon, for Douglas County, began and held in the Court Room at the Court House in Roseburg Oregon, on Monday, the 20th day of May, 1907, at which were present:

Hon. J. W. HAMILTON,

Judge.

Geo. M. Brown, Dist. Atty.

Z. N. Agee, Clerk.

H. T. McClallen, Sheriff.

Among other proceedings the following was had on the 20th day of May, 1907, being the first judicial day of the term, to wit:

JOHN W. JOHNSON,

Plaintiff,

vs.

AARON JOHNSON and ELINE ENGBRITSON,
Defendants.

Now at this time this cause coming on for hearing plaintiff appearing by his attorney Coshow & Rice,

upon motion of plaintiff's attorney.

It is considered, ordered and adjudged that said cause be and the same is hereby continued for service.

J. W. HAMILTON,

Circuit Judge.

Attest: Z. N. Agee,

Clerk.

By E. H. Lenox, Deputy.

(Endorsed on the back is the following:—)

J. W. JOHNSON,

vs.

A. JOHNSON, et al.

May 20, 1907.

Vol. 18, P. 125.

*In the Circuit Court of the State of Oregon
for Douglas County.*

JOHN W. JOHNSON,

Plaintiff,

vs.

AARON JOHNSON and ELINE ENGBRITSON,

Defendants.

MOTION.

Comes now the plaintiff above named, by his attorney, and moves the Court for an Order for service of summons in the above entitled action by publication.

This motion is based upon an affidavit of plaintiff herein and herewith filed.

COSHOW & RICE,

Attorneys for Plaintiff.

*In the Circuit Court of the State of Oregon
for Douglas County.*

STATE OF OREGON,

County of Douglas—ss.

I, O. P. Coshow, being first duly sworn say that I am one of the plaintiff's attorneys in the above entitled action. That the post office address of neither of the defendants could be ascertained at the present time. That I prepared the affidavit of John W. Johnson, filed herewith, and mailed it to his attorney at Hoquiam, for his execution. That I requested information regarding the present post office address of both said defendants, and was informed by plaintiff through his attorney that the same is unknown to him, and could not be ascertained by him through inquiry among the former associates and friends of said defendants at Hoquiam, or by other means.

That the last known post office address of defendants is as follows, Aaron Johnson, at Hoquian, Washington, Eline Engebritson, at Seattle, Washington, but the local address is not known.

O. P. COSHOW.

Subscribed and sworn to before me this 9th day of September, 1907.

[Seal.]

DEXTER RICE,

Notary Public for Oregon.

*In the Circuit Court of the State of Oregon
for Douglas County.*

JOHN W. JOHNSON,

Plaintiff,

vs.

AARON JOHNSON and ELINE ENGEBRITSON,
Defendants.

AFFIDAVIT.

STATE OF OREGON,

County of Chehalis—ss.

I, John W. Johnson being first duly sworn say that I am plaintiff above named that the above named plaintiff commenced action against the above named defendants in the above entitled Court on the 1st day of April, 1907, by filing his complaint herein, and causing summons to be placed in the hands of the Sheriff of said County, for service on the defendants. That a copy of said Complaint is hereunto affixed, and made a part of this Affidavit. That on the 1st day of May, 1907, the said Sheriff of Douglas County returned said Summons, endorsed in effect that he was unable to find said defendants in said county and state. That I am personally acquainted with both said defendants, and that neither of said defendants reside in said State of Oregon. That neither of said defendants is in the State of Oregon at this time, so as to be served with said Summons personally within the State of Oregon. That the defendant, Aaron Johnson, a short time prior to the time said action was commenced, resided at Hoquiam, County of Chehalis, State of Washington, and has since gone to Canada, and his exact post office address is not known, and after diligent inquiry among his former associates at Hoquiam, I am unable to ascertain the same. That the defendant, Eline Engebritson also resided at Ho-

quiam, in said county and state a short time prior to the commencement of said action, and has since then moved from the city of Hoquiam to some other part of Washington, and her post office address is unknown to affiant, that the last affiant knew of her whereabouts she was in Seattle, in the State of Washington, but her local address was and is unknown to affiant. That on the 1st day of April, 1907, plaintiff filed his affidavit and undertaking for Attachment in the above entitled action, and thereupon the writ of attachment was duly issued in the above entitled action, and placed in the hands of the Sheriff of Douglas County for service, on the said 1st day of April, 1907. That on said date the said Sheriff duly served the writ of Attachment by levying upon and attaching the following described real property, situate in Douglas County, Oregon, to wit: The Northwest quarter of Section 10, Township 21 South, Range 7 West, Willamette Meridian, which said real property belongs to the above named defendant, and did on the first day of April, 1907, belong to the said defendant Aaron Johnson. That Plaintiff has good cause of action against the defendants, and the defendants can not be personally served with summons in the State of Oregon. That the above entitled court has jurisdiction of cause of action, as stated in said complaint. That both of said defendants are proper parties to said action and a good cause of action is stated in said Complaint against both of said defendants.

J. W. JOHNSON.

Subscribed and sworn to before me this 7th of Sep-

tember, 1907.

[Seal.]

CHARLES W. HODGDON,

Notary Public for Washington, residing at Hoquiam, Wash.

*In the Circuit Court of the State of Oregon
for Douglas County.*

JOHN W. JOHNSON,

Plaintiff.

vs.

AARON JOHNSON and ELINE ENGBRITSON,
Defendants.

Comes now the Plaintiff above named and moves the Court for the Order for Service of Summons on the Defendant in the above entitled action by publication.

Attorneys for Plaintiff.

*In the Circuit Court of the State of Oregon
for Douglas County.*

JOHN W. JOHNSON,

Plaintiff,

vs.

AARON JOHNSON and ELINE ENGBRITSON,
Defendants.

Plaintiff for cause of action against the Defendants complains and alleges:

That on the 2nd day of March, at Hoquiam, Washington, the defendants, for value received, made, executed and delivered to the Plaintiff, their certain

promissory note, wherein and whereby they promised jointly and severally to pay to Plaintiff the sum of Two Hundred Seventy-five (275.00) Dollars in monthly installments of Twenty (20.00) Dollars per month, beginning April 1, 1904, with interest from date at the rate of Eight (8) per cent per annum; and if not paid as therein specified, the whole sum of both principal and interest should become immediately due and collectable at the option of the holder of the note, and further promised in and by said promissory note, to pay to Plaintiffs a reasonable sum as attorneys' fees in case suit or action should be instituted to collect said note or any part thereof;

That no payments have been made on said note, except the sum of Twenty (20.00) Dollars paid April 8, 1904, and the further sum of Twenty (20.00) Dollars paid May 10, 1904;

That Thirty (30.00) Dollars is a reasonable attorney fee for instituting this action for the collection of said note;

That there is now due and owing from the Defendants to the Plaintiffs, the full sum of Two Hundred Seventy-five (275.00) Dollars with interest thereon at the rate of eight (8) per cent per annum, from the 2nd day of March, 1904, less the sum of Twenty (20.00) Dollars paid April 8, 1904, and the further sum of Twenty (20.00) Dollars paid May 10, 1904; and also due from Defendants to Plaintiff, the further sum of Thirty (30.00) Dollars, as attorney's fees for instituting this action for the collection of said note.

WHEREFORE Plaintiff demands judgment

against the Defendants and each of Defendants for the full sum of Two Hundred Seventy-five (275.00) Dollars, in Gold Coin of the United States of America together with interest thereon in like gold coin from the 2nd day of March, 1904, at the rate of eight (8) per cent per annum, less the sum of Twenty (20.00) Dollars paid April 8, 1904, and the further sum of twenty (20.00) Dollars paid May 10, 1904; and Plaintiff further demands judgment against the Defendants for the further sum of Thirty (30.00) Dollars, attorneys fees, and plaintiffs costs and disbursements herein to be taxed.

COSHOW & RICE,
Attorneys for Plaintiff.

STATE OF OREGON,
County of Douglas—ss.

I, O. P. Coshow, being first duly sworn, say that I am one of Plaintiff's attorneys in the above entitled action; that the foregoing Complaint is true as I verily believe; that I make this verification for the reason that I am such an attorney and that this action is founded upon a written instrument for the payment of money only, and said written instrument is in my possession.

O. P. COSHOW.

Subscribed and sworn to before me this 1st day of April, 1907.

Z. N. AGEE,
County Clerk.

No.....
IN THE CIRCUIT COURT
OF THE
STATE OF OREGON,
FOR DOUGLAS COUNTY.

JOHN W. JOHNSON,
.....

Plaintiff,

vs.

AARON JOHNSON,
.....

Defendants,

Motion, etc., for Publication of
Summons.

Filed this 9th day of Sept., A. D.,
1907.

Z. N. AGEE,

Clerk.

E. H. Lenox,

Deputy.

COSHOW & RICE,
Attorneys for Plaintiff.

*In the Circuit Court of the State of Oregon
for Douglas County.*

JOHN W. JOHNSON,

Plaintiff,

vs.

AARON JOHNSON and ELINE ENGEBRITSON,

Defendants.

ORDER.

Based upon the Motion of Plaintiff and the Affidavits of plaintiff, and his attorney, O. P. Coshow, and the return from the Sheriff of Douglas County, State of Oregon, on the summons, and the Complaint, all on file in the above entitled court and cause, it is,

ORDERED, That service of summons in the above entitled action be served upon the above named Defendants by publication in the Roseburg Review for a period of Six (6) weeks, once each week; and that a copy of said summons and complaint in said action be forthwith mailed to defendant Aaron Johnson, at Hoquiam, Chehalis County, Washington, that being his last known post office address, and to the defendant Eline Engebritson at Seattle, in the State of Washington, that being her last known post office address.

Done at Roseburg, Oregon, this 9th day of September, 1907.

G. W. WONACOTT,

County Judge for Douglas County, Oregon

(Endorsed on the back of this Order is the following:—)

IN THE CIRCUIT COURT OF THE STATE OF
OREGON FOR DOUGLAS COUNTY.

JOHN W. JOHNSON,

Plaintiff,

vs.

AARON JOHNSON, ET AL.,

Defendants.

Order for publication of Summons.

Filed this 9th day of Sept., A. D., 1907.

Z. N. AGEE,

Clerk.

By E. H. Lenox, Deputy.

COSHOW & RICE,

Attorneys for Plaintiff.

*In the Circuit Court of the State of Oregon
for Douglas County.*

JOHN W. JOHNSON,

Plaintiff,

vs.

AARON JOHNSON and ELINE ENGBRITSON,

Defendants.

Comes now the Plaintiff by his Attorneys Coshow & Rice and moves the Court for an Order for Publication of Summons in the above entitled action.

This Motion is based upon the pleadings in this action and the Affidavits of O. P. Coshow and the Plaintiff herein.

COSHOW & RICE,

Attorneys for Plaintiff.

(Endorsed on the back is the following:—)

*In the Circuit Court of the State of Oregon
for Douglas County.*

JOHN W. JOHNSON,

Plaintiff,

vs.

AARON JOHNSON and ELINE ENGBRITSON,
Defendants.

MOTION.

*In the Circuit Court of the State of Oregon
for Douglas County.*

JOHN W. JOHNSON,

Plaintiff,

vs.

AARON JOHNSON and ELINE ENGBRITSON,
Defendants.

STATE OF OREGON,

County of Douglas—ss.

I, O. P. Coshaw, being first duly sworn, say: That heretofore, on the 9th day of September, 1907, Hon. G. W. Wonacott, County Judge, duly made an order for Publication of Summons in the above entitled action, and directed that copies of said summons be forthwith mailed to the Defendants and each of them at Hoquiam, Washington; That on the 10th day of September, 1907, I caused copies of said Summons and copies of the Complaint duly certified, to be mailed to said Defendants, separately as shown by the affidavit of Evelyn Johnson hereto attached, marked Exhibit A, and made a part of this affidavit; by in-

advertence I neglected and omitted to have said summons published, and summons has not been published in this action; that both of said letters addressed to the Defendants, as aforesaid, at Hoquiam, Washington, have been returned unopened and uncalled for; that the address of either of the defendants is unknown to the Plaintiff and cannot be ascertained with reasonable diligence; that due and strict enquiry has been made to ascertain said addresses from the former friends of the said Defendants living at Hoquiam, Washington, by the Plaintiff and his attorneys at Hoquiam, C. W. Hodgdon, and no one can be found who known their addresses.

O. P. COSHOW.

Subscribed and sworn to before me this 11th day of October, 1907.

[Seal.]

DEXTER RICE,

Notary Public for Oregon.

*In the Circuit Court of the State of Oregon
for Douglas County.*

JOHN JOHNSON,

Plaintiff,

vs.

AARON JOHNSON and ELINE ENGBRITSON,
Defendants.

AFFIDAVIT.

I, Evelyn Johnson, being first duly sworn say that I am a citizen of the United States over the age of twenty-one years.

That on the 10th day of September, 1907, at Rose-

burg, Oregon, I deposited in the United States post office, enclosed in an envelope securely sealed, and with postage fully prepaid, a copy of the Complaint and summons, directed to be published, in the above entitled action, duly certified to be such copies by O. P. Coshaw, an attorney for the plaintiff, plainly addressed to the above named defendant, Aaron Johnson, Hoquiam, Washington; and also a like copy of said Summons and Complaint, enclosed in an envelope, with postage fully prepaid, as aforesaid, and plainly addressed to the above named defendant Eline Engebritson, Seattle, Washington.

That I am not related to either the plaintiff nor defendant named above, nor am I a party to said action.

EVELYN JOHNSON.

Subscribed and sworn to before me, this 10th day of Sept., 1907.

[Seal.]

DEXTER RICE,

Notary Public for Oregon.

(Endorsed on Cover is the following:—)

*In the Circuit Court of the State of Oregon
for Douglas County.*

JOHN W. JOHNSON,

....

Plaintiff,

vs

AARON JOHNSON and ELINE ENGEBRITSON,

Defendants.

MOTION.

Filed this 11th day of Oct., A. D., 1907.

Z. N. AGEE,

Clerk.

By E. H. Lenox, Deputy.
COSHOW & RICE,
Attorneys for Plaintiff.

*In the Circuit Court of the State of Oregon
for Douglas County.*

JOHN W. JOHNSON,

Plaintiff,

vs.

AARON JOHNSON and ELINE ENGBRITSON,
Defendants,

It appearing to the satisfaction of the Court that neither of the Defendants above named can be found within the State of Oregon, and that a cause of action exists against both of said Defendants and that both of said Defendants are proper parties to the above entitled action; and it appearing to the satisfaction of the Court that the postoffice address of neither of the Defendants is known and cannot be found with reasonable diligence; it is

ORDERED that both of said Defendants be served with Summons by publication in the Roseburg Review for a period of six successive weeks.

Dated this 11th day of October, 1907.

Judge.

(Endorsed on the back is the following:—)

*In the Circuit Court of the State of Oregon
for Douglas County.*

JOHN W. JOHNSON,

Plaintiff,

vs.

AARON JOHNSON and ELINE ENGBRITSON,
Defendants.

ORDER.

10|11|07.

Vol. 18, P. 262.

Be It Remembered, That at a regular term of the Circuit Court of the State of Oregon, for Douglas County, began and held in the Court room at the Court House in Roseburg, Oregon, on Monday the 20th day of January, 1908, at which were present:

Hon. J. W. HAMILTON,
Judge.

GEO M. BROWN,
Prosecuting Atty.

Z. N. AGEE,
Clerk, by E. H. Lenox, Deputy.
H. T. McCLALLEN,
Sheriff.

Among other proceedings the following was had on the 22nd day of January, 1908, being the 3rd Judicial day of the term to wit:

JOHN W. JOHNSON,

Plff

vs.

AARON JOHNSON and ELINE ENGBRITSON,
Dfts

Now at this time this cause coming on for hearing, plaintiff appearing by his attorneys, Coshow & Rice, and upon motion of plaintiff's attorneys for continuance.

It is considered, ordered and adjudged that said cause be and the same is hereby continued for the term.

J. W. HAMILTON,
Judge.

Attest:

Z. N. Agee, Clerk.

By E. H. Lenox, Deputy.

1|22|08.

Vol. 18, P. 453.

*In the Circuit Court of the State of Oregon
for the County of Douglas.*

COPY.

SUMMONS.

In the Circuit Court of the State of Oregon for Douglas County:

John W. Johnson, Plaintiff vs. Aaron Johnson and Eline Engebritson, Defendants.

In the name of the State of Oregon, to Aaron Johnson and Eline Engebritson, the defendants above named, you and each of you are hereby required to appear in the above entitled Court to answer complaint of the plaintiff in the above entitled cause on or before six weeks from the date of the first publication of this summons, and if you fail to so appear and answer said complaint the plaintiff will take judgment against you, and each of you, in the sum or Two Hundred Seventy-five and no 100 Dollars (\$275.00) in gold coin of the United States of America, with interest thereon in like gold coin, at the rate of eight

(8) per cent per annum, from the 2nd day of March, 1904, less the sum of Twenty Dollars (\$20.00) paid April 8, 1904, and the further sum of Twenty Dollars (\$20.00) paid May 10, 1904, and plaintiff will take judgment for the further sum of Thirty Dollars (\$30.00) attorneys fees, and the costs and disbursements of this action to be taxed; and will secure an order in the above entitled court for the sale of the Northwest quarter of Section 10, Township 21 South, Range 7 West, Willamette Meridian, Douglas County, State of Oregon, heretofore attached in the above entitled action, to satisfy said judgment.

This summons is published in the Roseburg Review by order of the above entitled court from J. W. Hamilton, Judge, made Oct. 11, 1907, and will be published once each week for six (6) successive weeks. The date of the first publication of this summons is Oct. 14, 1907.

COSHOW & RICE,

Attorneys for Plaintiff.

Office of

THE ROSEBURG REVIEW,

Roseburg, Oregon.

Issued every Monday and Thursday.

I, L. Wimberly being first duly sworn, say I am the publisher and printer of the Roseburg Review.

That said Review is a semi-weekly newspaper published and issued semi-weekly and regularly at Roseburg, in Douglas County, State of Oregon, and is of general circulation in said County and State.

That the notice, of which the one hereto attached is

a true and correct copy, was published in said paper once a week for 6 weeks, being published 7 times; the first on the 14th day of October, 1907, and the last on the 25th day of November, 1907.

That said notice was published in the regular and entire issue of said paper during the said period and times of publication, and that the said notice was published in the newspaper proper and not in a supplement.

L. WIMBERLY.

Subscribed and sworn to before me this 16th day of May, 1908.

[Seal.]

O. P. COSHOW, JR.,
Notary Public for Oregon.

(Endorsed on the back is the following:—)

*In the Circuit Court State of Oregon
County of Douglas.*

JOHN W. JOHNSON,

Plaintiff,

vs.

AARON JOHNSON, et al.,

Defendants.

PROOF OF PUBLICATION.

Filed May 16, 1908.

Z. N. AGEE,
Clerk.

*In the Circuit Court of the State of Oregon
for Douglas County.*

JNO. W. JOHNSON,

Plaintiff,

vs.

AARON JOHNSON and ELINE ENGBRITSON,
Defendants,

Comes now the Plaintiff above named and moves
the Court for Judgment by Default against said De-
fendants.

COSHOW & RICE,
Attorneys for Plaintiff.

(Endorsed on back is the following:—)

*In the Circuit Court of the State of Oregon
for Douglas County.*

JNO. W. JOHNSON,

Plaintiff,

vs.

AARON JOHNSON, ET AL.,

Defendants.

MOTION.

Filed May 16, 1908.

Z. N. AGEE,
Clerk.

*In the Circuit Court of Douglas County,
State of Oregon.*

Be It Remembered, that a regular term of the Cir-
cuit Court of the State of Oregon for Douglas Coun-
ty, began and held in the Court Room in Roseburg,
Oregon, on Monday the 20th day of January, 1908, at
which were present:

Hon. L. T. HARRIS,
Judge.

GEO. M. BROWN,

Pros. Atty.

Z. N. AGEE,

Clerk

H. T. McCLALLEN,

Sheriff.

Among other proceedings the following was had on Saturday, the 16th day of May, 1908, being the 11th Judicial day of the term, to-wit:

*In the Circuit Court of the State of Oregon
for Douglas County.*

JNO. W. JOHNSON,

Plaintiff,

vs.

AARON JOHNSON and ELINE ENGBRITSON,
Defendants.

This cause coming on to be heard upon Motion of Plaintiff for Judgment by Default, Plaintiff appearing by his Attorneys, Coshow & Rice, and neither of Defendants appearing; and,

It appearing to the satisfaction of the Court that both of said Defendants were duly served with Summons herein, long prior to this date, and that neither of said Defendants have answered the Complaint of Plaintiff, or otherwise pleaded thereto, it is

ADJUDGED AND CONSIDERED that said Defendants and both of them are in default and their default is hereby entered; and

It appearing to the satisfaction of the Court that said Defendants are indebted to the Plaintiff in the

full sum of Two Hundred Seventy-five (275.00) Dollars, in gold coin of the United States of America, with interest thereon in like gold coin at the rate of eight per cent per annum, from the 2nd day of March, 1904, less the sum of Twenty (20.00) Dollars paid April 8, 1904, and the further sum of Twenty (20.00) Dollars, paid May 10th, 1904.

That thirty (30.00) Dollars is a reasonable attorney fee; and,

It further appearing to the satisfaction of the Court, that heretofore, to wit; on the 21st day of April, 1907, at the suit of Plaintiff herein, the following real property belonging to the Defendant Aaron Johnson, was duly attached, to wit, the Northwest quarter, Section 10, Township 21 South, Range 7 West, Willamette Meridian, in Douglas County, Oregon; it is, therefore,

CONSIDERED AND ADJUDGED that plaintiff have and recover off and from the Defendants the full sum of Three Hundred Fifteen (315.00) Dollars with interest at 8 per cent per annum from May, 16, 1908, the further sum of Thirty (30.00) Dollars, attorneys fees, all in gold coin of the United States of America, and Plaintiff's costs and disbursements herein, taxed at Fourteen and (14.50) 50|100 Dollars, and that Execution issue to enforce this Judgment; it is further,

ADJUDGED, CONSIDERED AND ORDERED, That the real property heretofore attached in said action, hereinbefore described, be sold in manner prescribed by law, and that the proceeds of said sale be

applied in payment of said judgment and the excess, if any, be paid to the Clerk of this Court.

L. T. HARRIS,

Judge.

Attest:

Z. N. Agee,

Clerk.

(Endorsed on back is the following:—)

*In the Circuit Court of the State of Oregon
for Douglas County.*

JNO W. JOHNSON,

Plaintiff,

vs.

AARON JOHNSON and ELINE ENGBRITSON,

Defendants.

JUDGMENT ORDER.

May 16.

ENTERED.

Vol. 18, P. 521-522.

*In the Circuit Court of the State of Oregon
for the County of Douglas.*

STATE OF OREGON,

County of Douglas—ss.

TO THE SHERIFF OF THE COUNTY OF
DOUGLAS, STATE OF OREGON, GREET-
ING:

In the Name of the State of Oregon, and in conformity with the foregoing judgment order and decree, you are hereby commanded to make sale of the

above described property to satisfy the sum of Three Hundred Fifteen Dollars (\$315.00) with interest thereon at the rate of 8 per cent per annum from the 16th day of May, 1908, and the further sum of Thirty Dollars, (\$30.00) with interest thereon at the rate of 8 per cent per annum from the 16th day of May, 1908, and the further sum of Fourteen and 50/100 Dollars (\$14.50) costs and disbursements and the cost of and upon this Writ, and have the same in said Circuit Court within 60 days after you receive this writ.

WITNESS my hand and the seal of said Circuit Court this 14th day of July, 1908.

[Seal.]

E. H. LENOX,

Clerk.

(Endorsed on the back of this Execution is the following:—)

IN THE CIRCUIT COURT.

JOHN W. JOHNSON,

vs.

AARON JOHNSON, ET AL.

Received July 14, 1908.

B. FENTON,

Sheriff.

By R. T. Ashworth, Deputy.

EXECUTION.

To the Sheriff of Douglas County, returnable in 60 days.

Judgment\$315.00

Interest8 per cent

Attorney's Fee 30.00

Disbursements and Costs 14.50

Filed Aug. 31, 1908.

E. H. LENOX,

Clerk.

By Blanche Reed, Deputy.

Judgment rendered May 16, 1908.

This Writ issued at the instance of Coshow & Rice,
Attorneys; E. H. Lenox, Clerk.

STATE OF OREGON,

County of Douglas—ss.

I, B. Fenton, Sheriff of Douglas County, Oregon, hereby certified that pursuant to the attached execution and Order of Sale, duly issued out of the Circuit Court of the State of Oregon for Douglas County, under the seal of said Court and dated the 14th day of July, 1908, directing me to sell in the manner prescribed by law, the Northwest quarter of Section 10, Township 21 South, of Range 7 West, W. M., in Douglas County, Oregon, to satisfy that certain judgment, duly rendered and entered of record in the said Circuit Court, in favor of John W. Johnson, Plaintiff, and against Aaron Johnson and Eline Engebritson, defendants, for the sum of \$315.00, with interest at the rate of eight per cent per annum from the 16th day of May, 1908, and a further sum of \$30.00 Attorneys fees, all in gold coin of the United States of America, and the further sum of \$14.50, costs and disbursements, together with interest upon said Attorneys fees and costs and disbursements at the rate of six per cent per annum, from and after the 16th day of

May, 1908, on the 16th day of May, 1908.

I did, on the 22nd day of August, at the hour of 1 o'clock P. M., expose said real property for sale, and there being no bidders I did by public proclamation continue the sale for one week, and on the 29th day of August, 1908, at the hour of 1 o'clock P. M., again expose said real property for sale at public auction, and did sell the same to the Plaintiff in said execution, namely: John W. Johnson, for the sum of \$380.04, said John W. Johnson being the highest bidder and the said sum of \$380.04 being the highest sum bid at said sale.

That I did thereupon execute and deliver to the said John W. Johnson a Certificate of Sale, in manner and form as prescribed by law.

That before proceeding to said sale, I caused to be published in the Roseburg Review, a newspaper printed, published and of general circulation in Douglas County, Oregon, once each week for four successive weeks, immediately prior to the 28th day of August, 1908, a notice of said sale, a copy of which notice, together with the proof of publication therein, is hereto attached, marked exhibit "A", and made a part of this return.

I did on the 19th day of July, 1908, cause like notices of said sale to be posted in three of the most public places in Douglas County, Oregon, to wit: One upon the Bulletin Board at the main entrance of the Court House in Roseburg, Douglas County, Oregon; one of said notices was posted at the Post Office in Glendale, Douglas County, Oregon; and another of

said notices was posted at the Post Office in Myrtle Creek, Douglas County, Oregon.

That all of said notices were posted conspicuously and in such a manner as to be easily read by all persons passing along or by said public places.

That the notices as posted aforesaid were in all respects similar to the copy of notice published in the Roseburg Review, a copy of which is embodied in Exhibit "A" of this return.

That I have applied the said sum of \$380.04 received from the sale of said land to the payment of the costs of said sale, amounting to \$12.50, and the balance, \$365.54, to the payment of Plaintiff's Judgment, attorney fees, costs and disbursements, and herewith return said execution, satisfied in full.

Dated at Roseburg, Oregon, August 31, 1908.

B. FENTON,

Sheriff of Douglas County, Oregon.

*In the Circuit Court of the State of Oregon
for the County of Douglas.*

Exhibit "A."

COPY.

NOTICE OF SHERIFF'S SALE.

In the Circuit Court of the State of Oregon, for Douglas County.

John W. Johnson, Plaintiff,

vs.

Aaron Johnson and Eline Engebritson, Defendants.

By virtue of a Writ of Execution and order of Sale, duly issued out of and under the seal of the above en-

titled Court, in the above entitled action, to me directed and dated the 16th day of May, 1908, commanding me to satisfy the judgment in the above entitled cause, duly rendered, entered and docketed in the above entitled Court on the 16th day of May, 1908, by the sale of the real property theretofore, on the 21st day of April, 1907, duly attached at the suit of the Plaintiff in the above entitled cause; said judgment being in favor of the above named Plaintiff and against the above named Defendants, for the sum of Three Hundred Fifteen (\$315.00) Dollars, with interest at the rate of eight (8) per cent per annum from the 16th day of May, 1908, and further sum of Thirty (\$30.00) Dollars attorneys' fees all payable in United States Gold Coin, and Plaintiff's costs and disbursements in said action taxed at Fourteen and (\$14.50) 50-100 Dollars, with interest on said sum of Attorney's fees and costs and disbursements at the rate of six (6) per cent per annum from the 16th day of May, 1908, and the costs upon and in execution of said Writ of Execution; now therefore, I will expose for sale and will sell to the highest bidder for cash at one o'clock in the afternoon on Saturday, the 22nd day of August, 1908, at the Court House front door in Roseburg, Douglas County, Oregon, all the right, title and interest the said Defendants or either of them had in and to said attached real property on the 21st day of April, 1907, or at any time since; said real property being described as follows, to wit:

The Northwest quarter (NW $\frac{1}{4}$) of Section 10, Township 21 South, Range 7 West, Willamette Me-

ridian, in Douglas County, Oregon, to satisfy said judgment, costs and all accruing costs.

Dated this 18th day of July, 1908.

B. FENTON,
Sheriff of Douglas County, Oregon.

Office of
THE ROSEBURG REVIEW
Roseburg, Oregon.

Issued every Monday and Thursday.

I, M. M. Miller, being first duly sworn, say I am the principal Clerk of the Roseburg Review.

That said Review is a semi-weekly newspaper published and issued semi-weekly and regularly at Roseburg, in Douglas County, State of Oregon, and is of general circulation in said County and State.

That the notice, of which the one hereto attached is a true and correct copy, was published in said paper once a week for four weeks, being published five times; the first on the 20th day of July, 1908, and the last on the 17th day of August, 1908.

That said notice was published in the regular and entire issue of said paper during the said period and times of publication, and that the said notice was published in the newspaper proper and not in a supplement.

M. M. MILLER.

Subscribed and sworn to before me this 25th day of August, 1908.

[Seal.]

G. V. WIMBERLY,
Notary Public for Oreg.

*In the Circuit Court of the State of Oregon
for Douglas County.*

JNO. W. JOHNSON,

Plaintiff,

vs.

AARON JOHNSON and ELINE ENGEBRITSON,
Defendants.

This cause coming on to be heard upon Motion of Plaintiff for Judgment by Default, Plaintiff appearing by his Attorneys, Coshow & Rice, and neither of Defendants appearing; And,

It appearing to the satisfaction of the Court that both of said Defendants were duly served with summons herein, long prior to this date, and that neither of said Defendants have answered the Complaint of Plaintiff, or otherwise pleaded thereto, it is

Adjudged and Considered that said Defendants and both of them are in default and their default is hereby entered; and,

It appearing to the satisfaction of the Court that said Defendants are indebted to the Plaintiff in the full sum of Two hundred seventy-five (275.00) Dollars, in Gold Coin of the United States of America, with interest thereon in like gold coin at the rate of eight per cent per annum from the 2nd day of March, 1904, less the sum of Twenty (20.00) dollars paid April 8th, 1904, and the further sum of Twenty (20.00) dollars, paid May 10th, 1904;

That Thirty Dollars (30.00) is a reasonable Attorney fee; And,

It further appearing to the satisfaction of the Court that heretofore, to wit, on the 21st day of April, 1907, at the suit of Plaintiff herein, the following real property belonging to the Defendant Aaron Johnson, was duly attached, to wit; The Northwest quarter, Section Ten, Township 21, South, Range 7 West, Willamette Meridian, in Douglas County, Oregon, It is Therefore,

Considered and Adjudged that Plaintiff have and recover off and from the Defendants the full sum of Three Hundred Fifteen (315.00) Dollars, with interest at eight per cent per annum from May 16th, 1908, and the further sum of Thirty (30.00) dollars, Attorneys fees all in gold coin of the United States of America, and Plaintiff's costs and disbursements herein, taxed at Fourteen and (14.50) 50|100 dollars and that Execution issue to enforce this Judgment. It is further,

Adjudged, Considered and Ordered that the real property heretofore attached in said action, hereinbefore described, be sold in manner prescribed by law, and that the proceeds of said sale be applied in payment of said Judgment and the excess, if any, be paid to the Clerk of this Court.

(Record Signed).

L. T. HARRIS,
Judge.

Attest:

Z. N. Agee,
Clerk.

Dated May 16th, 1908.

*In the Circuit Court of the State of Oregon
for Douglas County.*

JOHN W. JOHNSON,

Plaintiff,

vs.

AARON JOHNSON and ELINE ENGBRITSON,

Defendants.

MOTION.

Comes now the Plaintiff above named and moves the Court for an order confirming the sale of real property heretofore made upon the execution of the above entitled action.

This motion is based upon the files and papers in the above entitled cause, including the return of the Sheriff of Douglas County for the sale of real property, attached in this action on the 1st day of April, 1907.

COSHOW & RICE,

Attorneys for Plaintiff.

(Endorsed on back is the following:—)

*In the Circuit Court of the State of Oregon
for Douglas County.*

JOHN W. JOHNSON,

Plaintiff,

vs.

AARON JOHNSON and ELINE ENGBRITSON,

Defendants.

MOTION.

Filed Sep. 16, 1908.

E. H. LENOX,

County Clerk.

*In the Circuit Court for Douglas County,
State of Oregon.*

Be It Remembered, That at a regular term of the Circuit Court of the State of Oregon, for Douglas County, began and held in the court room at the court house in Roseburg, Oregon, on Monday the 12th day of Oct. 1908, at which were present:

Hon. J. W. HAMILTON,
Judge.

GEO. M. BROWN,
Pros. Atty.

E. H. LENOX,
Clerk.

B. FENTON,
Sheriff.

Among other proceedings the following was had on the 12th day of Oct., 1908, being the first judicial day of the term, to wit:

JOHN W. JOHNSON,

Plaintiff,

vs.

AARON JOHNSON and ELINE ENGBRITSON,
Defendants.

This matter coming on now to be heard upon the motion of the Plaintiff for confirmation of the sale of real property heretofore made upon the execution issued out of this court and cause; and

It appearing that the Sheriff's report of said sale has been on file more than ten (10) days prior to this date and no objections have been made thereto, and

no objections are now made to the confirmation of said sale; and,

It further appearing to the satisfaction of the Court that on the first day of April, 1907, the Sheriff of Douglas County, Oregon, by virtue of a writ of attachment duly issued out of the above entitled court and cause, did attach, secure and levy upon the Northwest quarter of Section Ten (10), in Township Twenty-one (21) South of Range Seven (7) West, of the Willamette Meridian, in Douglas County, Oregon, and did thereafter by virtue of said execution duly expose for sale at public auction in the manner prescribed by law, after due notice and advertisement of said sale as prescribed by law, and did sell to John W. Johnson, the said Plaintiff, the said real property for the sum of Three Hundred Fifteen (315.00) Dollars; and

It appearing to the satisfaction of the Court that said sale is in all respects regular; It is, therefore,

Ordered, Adjudged and Decreed that said sale be, and is hereby confirmed, and the Sheriff of Douglas County is hereby directed to make and deliver to the Plaintiff a good and sufficient deed, conveying said premises and all the right, title and interest of the Defendants in and to the same on the first day of April, 1907, or at any time since, unless the same be redeemed within one year from this date.

J. W. HAMILTON,

Judge.

Attest:

E. H. Lenox, Clerk.

Vol. 19, P. 14-15.

10|12|08.

STATE OF OREGON,

County of Linn—ss.

I, Z. N. Agee, being first duly sworn, on oath say,

That I was County Clerk of Douglas County on the first day of April, 1907, having been elected such Clerk at the regular biennial June election of the State of Oregon in June, 1906, and served as such County Clerk from the first Monday in July, 1906, until the first Monday in July, 1908;

That on the first day of April, 1907, O. P. Coshow swore to a complaint and an affidavit for a writ of attachment in a certain action at law entitled John W. Johnson, Plaintiff, vs. Aaron Johnson and Eline Engebritson, Defendants, before me, as such County Clerk;

That immediately thereafter I filed the same and certified to the affidavit of the said O. P. Coshow to said Complaint and by inadvertence omitted to certify to the affidavit for writ of attachment;

That I examined the files on January 5, 1911, including said complaint and said affidavit in the said action at law and refreshed my memory thereby;

That I am very positive that I administered the oath to the said O. P. Coshow and that he took the said oath before me;

That I do not have a distinct recollection of this particular instance but I am very positive that I never would have certified to the affidavit of the complaint

except it had been sworn to and that the said complaint and said affidavit for attachment were filed almost simultaneously, the complaint having been filed first; That I was always very particular to formally administer the oath when an affidavit was taken before me.

Z. N. AGEE.

Subscribed and sworn to before me this 10th day of January, 1911.

[Seal.]

JOHN M. WILLIAMS,
Notary Public for Oregon.

STATE OF OREGON,

County of Douglas—ss.

I, O. P. Coshow, being first duly sworn, say that I am a member of the law firm of Coshow & Rice of Roseburg, Oregon.

That on the first day of April, 1907, as an attorney for the plaintiff in that certain action entitled John W. Johnson, Plaintiff, vs. Aaron Johnson and Eline Engebritson, defendants, filed in the Circuit Court of the State of Oregon for Douglas County on said first day of April, 1907;

That at said time, the plaintiff, John W. Johnson, was not in Douglas County, Oregon, so as to verify the complaint, and for that reason, and as his attorney, I verified the same and made the affidavit in his behalf for writ of attachment.

That the verification of said complaint and the affidavit for the writ of attachment were both made before Z. N. Agee, the County Clerk of said Douglas County and ex-officio Clerk of said Circuit Court;

That in accordance with my practice in such cases when I was obliged to verify a pleading or make other affidavit for an absent client. I prepared the same and made such affidavits before the County Clerk before filing such pleading or other document;

That the said Z. N. Agee, as County Clerk, formally administered the oath before certifying thereto;

That I have personally this day examined the said complaint and said affidavit for writ of attachment and both were filed on the first day of April, 1907, and the affidavits to both were dated on that date;

That the said County Clerk certified to the affidavit to the complaint, but inadvertently omitted to certify to the affidavit for writ of attachment.

That before the said affidavit for writ of attachment was filed the said Z. N. Agee, County Clerk, duly administered to me the oath and I was by said Z. N. Agee duly sworn to said affidavit for writ of attachment before the said affidavit was filed by the said Z. N. Agee.

O. P. COSHOW.

Subscribed and sworn to before me this sixth day of January, 1911.

[Seal.]

A. N. ORCUTT,

Notary Public for Oregon.

(Endorsed on the cover as follows:—)

In the Circuit Court for Douglas County.

State of Oregon

JOHN W. JOHNSON,

Plaintiff,

vs.

AARON JOHNSON, et al.,

Defendants.

PETITION.

Filed Jan. 16th, 1911.

E. H. LENOX,

Clerk.

*In the Circuit Court of the State of Oregon
for Douglas County.*

JOHN W. JOHNSON,

Plaintiff,

vs.

AARON JOHNSON and ELINE ENGBRITSON,

Defendants.

PETITION.

The undersigned, your petitioner, respectfully represents that the above named plaintiff commenced an action at law against the above named defendants in the above entitled Court by filing his complaint with the Clerk of said Court on the first day of April, A. D., 1907, to recover from the defendants the sum of Two Hundred Seventy-five (275) Dollars in gold coin of the United States of America with interest thereon in like gold coin, from the second day of March, 1904, at the rate of 8 per cent per annum less the sum of Twenty (20) Dollars, paid April 8, 1904, and less the further sum of Twenty (20) Dollars, paid May 10, 1904, and for judgment against said defendants for Thirty (30) Dollars, Attorneys' fees and plaintiff's costs and disbursements;

That after filing said complaint and on the same day the plaintiff caused his affidavit for attachment to be filed in said action and an undertaking for attachment whereupon a writ of attachment was duly issued out of said Court and Cause by the Clerk of said Court and on the first day of April, 1907, delivered to the Sheriff of Douglas County, Oregon, for service;

That on the same day a summons was placed in the hands of the Sheriff of Douglas County, Oregon;

That such proceedings were had on the said writ of attachment;

That the said sheriff by virtue thereof duly returned his certificate to the effect that he had on said first day of April duly attached all the right, title and interest of the said defendants, or either of them, in and to the Northwest quarter of Section 10, in Township 21 South, Range 7 West, of the Willamette Meridian, Douglas County, Oregon, on the first day of April, 1907;

That the said summons was returned on the 8th day of May, 1907, indorsed by the Sheriff to the effect that he could not find either of the defendants in Douglas County, Oregon;

That thereafter such proceedings were had in the above entitled action that by the order of the Judge of the above entitled Court, upon the affidavit of the plaintiff showing that neither of the defendants resided within the State of Oregon or could be found therein, and that both of them resided in the State of Washington, and that the said real property had been

duly attached in said action, service of summons in said action was made by publication once a week for six weeks in the Roseburg Review, a newspaper published and having a general circulation within the State of Oregon;

That thereafter, to wit: May 16, 1908, proof of the service of said publication was duly filed in the above entitled court and cause and on said day upon the motion of the plaintiff, judgment was duly rendered and entered on the 16th day of May, 1908, in favor of the above named defendants for the full sum of Three Hundred Fifteen (315) Dollars with interest at the rate of 8 per cent per annum from May 16, 1908, and the further sum of Thirty (30) Dollars, Attorneys' fees, all in gold coin of the United States of America, and plaintiff's costs and disbursements herein taxed at fourteen and 50/100 (14.50) Dollars;

That neither of the above defendants made or filed any appearance in said action but made default therein and the default of both defendants was duly entered;

That thereafter at the suit of the Plaintiff, the judgment creditor aforesaid, to wit: on the 14th day of July, 1908, the clerk of said Court duly issued an execution and order of sale upon said judgment said judgment having directed the sale of the above described real property to satisfy said judgment. Said writ of execution was duly delivered to the Sheriff of Douglas County, Oregon, on the 14th day of July, 1908, and after due notice and advertisement of said sale, in manner and form as required by law, the said

real property was duly exposed for sale at public auction and was sold to John W. Johnson for the sum of Three Hundred Eighty and 4/100 (380.04) Dollars and said execution was returned satisfying said judgment in full on the 31st day of August, 1908;

That thereafter and at the regular October Term for the above entitled Court for October, 1908, said sale was, upon the motion of the plaintiff, duly confirmed and thereafter no redemption having been made of the sale of said premises a deed was duly issued and delivered by the Sheriff of Douglas County, Oregon, to the said plaintiff and judgment creditor, the said John W. Johnson;

That by inadvertence the then Clerk of the above entitled Court, Z. N. Agee, omitted to certify to the oath taken by O. P. Coshow, an Attorney for the said plaintiff in the affidavit for attachment;

That the said affidavit was duly subscribed by said O. P. Coshow, and the oath was duly and regularly administered by said Z. N. Agee, County Clerk of Douglas County, Oregon, and ex-officio clerk of the above entitled court, but by an oversight he omitted subscribing the jurat certifying to the administering of the said oath;

That for a more complete and thorough understanding of the facts herein briefly set forth reference is hereby made to the affidavits of said Z. N. Agee and O. P. Coshow hereto attached and hereby made a part of this petition, to the judgment roll, execution and return of the sheriff thereon in the above entitled action, which are a part of the files and records of

this court and the above entitled cause;

WHEREFORE your petitioner prays for an order of the above entitled Court nunc pro tunc directing and permitting the said Z. N. Agee, formerly County Clerk for Douglas County, Oregon, to subscribe the jurat to the said affidavit for attachment certifying to the administering of said oath by said O. P. Coshow, upon which oath and affidavit the said writ of attachment was administered.

And your petitioner will ever pray.

JOHN W. JOHNSON,

Petitioner.

By O. P. Coshow, His Attorney.

STATE OF OREGON,

County of Douglas—ss.

I, O. P. Coshow, being first duly sworn, say that I am an attorney for the above named petitioner; that I have personal knowledge of the facts stated in the foregoing petition; that said petition is true as I verily believe; that I make this verification for and in behalf of the said petitioner.

O. P. COSHOW.

Subscribed and sworn to before me this 16th day of January, 1911.

[Seal.]

J. C. FULLERTON,

Notary Public for Oregon.

REGULAR TERM.

MONDAY, JANUARY 30TH, 1911.

*In the Circuit Court of the State of Oregon
for Douglas County.*

Be It Remembered, That at a regular term of the Circuit Court of the State of Oregon for Douglas County, began and held in the Court room at the Court house in Roseburg, Oregon, on Monday the 16th day of January, 1911, at which were present:

Hon. L. T. HARRIS,
Judge.

E. H. LENOX,
Clerk.

GEO. K. QUINE,
Sheriff

GEO. M. BROWN,
Pros. Atty.

Among other proceedings the following were had on Monday the 30th day of January, 1911, being the eighth judicial day of the term, to wit: Hon. J. W. Hamilton, Judge Presiding:

JOHN W. JOHNSON,

Plaintiff,

vs.

AARON JOHNSON and ELINE ENGBRITSON,
Defendants.

This matter coming on heretofore, to wit: on the 20th day of January, 1911 and taken under advisement until this time;

And it now appearing to the satisfaction of the Court that on the first day of April, 1907, O. P. Coshow, as attorney for the above named plaintiff, and for and in behalf of said plaintiff made an affidavit for attachment for the plaintiff, and made oath to said

affidavit before Z. N. Agee, then County Clerk for Douglas County, Oregon, and thereafter immediately filed said affidavit for attachment and a writ of attachment was duly issued thereon;

And it further appearing that by an oversight of the said Z. N. Agee, then County Clerk the said affidavit and oath made for and in behalf of the plaintiff by O. P. Coshow as aforesaid, was not certified;

It is therefore ordered that the said Z. N. Agee be and hereby is permitted, ordered and directed to certify to said affidavit for attachment now on file in the above entitled court and cause and to which the said O. P. Coshow made oath as aforesaid, said certification to be made now as for and on the 1st day of April, 1907, and that the Clerk of this Court attach the seal of this Court to said affidavit now as for and of this said first day of April, 1907.

J. W. HAMILTON,

Judge.

(Endorsed on the back is the following:—)

*In the Circuit Court of the State of Oregon
for Douglas County.*

JOHN W. JOHNSON,

Plaintiff,

vs.

AARON JOHNSON and ELINE ENGBRITSON,
Defendants.

ORDER.

Filed Jan. 30, 1911.

E. H. LENOX,
Co. Clerk.

From the Office of Coshow & Rice.
Vol. 20, P. 250.

STATE OF OREGON,

County of Douglas—ss.

I, E. H. Lenox, County Clerk of Douglas County, State of Oregon and ex-officio Clerk of the Circuit Court in and for said County and State, do hereby certify that the foregoing Transcript of the Papers in the case of John W. Johnson, Plaintiff vs. Aaron Johnson and Eline Engebritson, Defendants is a true and correct transcript of such original papers, being all of the papers in said case, as the same appear on file and of record in my office, care and custody.

IN TESTIMONY WHEREOF, I have hereunto set my hand and affixed the seal of said Court this 3rd day of June, A. D., 1911.

E. H. LENOX,
County Clerk.

[Seal.]

By Blanche Reed, Deputy Clerk.

Filed Mar. 15, 1912.

A. M. CANNON,
Clerk U. S. District Court.

[Plaintiff's Exhibit 2.]

AARON JOHNSON,

to

ANDREW JOHNSON.

This Indenture made this 21st day of May, A. D., 1904, between Aaron Johnson (bachelor) party of the first part, and Andrew Johnson, party of the second part, Witnesseth; that the said party of the first part, for and in consideration of the sum of One (1)

Dollars, lawful money of the United States of America, to me in hand paid by the said party of the second part, does by these presents grant, bargain, sell, convey and confirm unto the said party of the second part, his heirs, executors, administrators and assigns, the following real estate lying and being in the County of Douglas, State of Oregon, described as follows, to wit:

The northwest quarter (NW $\frac{1}{4}$) of Section No. ten (10), in township No. Twenty-one south (21 S.), of Range No. Seven west (7 W.), containing 160 acres. With all and singular the hereditaments and appurtenances to the same belonging or appertaining, the reversion or reversions, the remainder or remainders, rents, issues and profits thereof.

To have and to hold the above granted premises unto the said party of the second part, his heirs, executors, administrators, and assigns forever, with all the privileges and appurtenances thereto belonging. And the said party of the first part does covenant for himself and his heirs, executors, administrators and assigns to and with the said party of the second part, his heirs, executors, administrators and assigns as follows: 1st. That the said party of the first part is seized of the said premises in fee simple, and has good right to convey the same. 2nd. That the said party of the second part shall quietly enjoy the said premises. 3rd. That the said premises are free from all incumbrances. 4th. That the said party of the first part will warrant and defend the title to the same for-

ever against all lawful claims and demands whatsoever.

In Witness Whereof the said party of the first part has hereunto set his hand and seal the day and year first above written.

Signed and sealed in the presence of

AARON JOHNSON. [Seal.]

STATE OF WASHINGTON,

County of Chehalis—ss.

I, Wm. B. Ogden, a Notary Public, in and for the State of Washington, residing at Hoquiam in said county and duly commissioned and sworn, do hereby certify that on this 21st day of May, A. D., 1904, personally appeared before me Aaron Johnson to me known to be the individual described in and who executed the within instrument and acknowledged that he signed and sealed the same as his free and voluntary act and deed for the uses and purposes therein mentioned. Given under my hand and official seal this 21st day of May A. D., 1904.

[Seal.]

WM. B. OGDEN,

Notary Public in and for said State, residing at Hoquiam in said County.

Commission expires -----

STATE OF WASHINGTON,

County of Chehalis—ss.

I, J. W. Stamper, Clerk of the Superior Court for Chehalis County, State of Washington, holding terms at Montesano, for the County of Chehalis, which is a court of record having common law jurisdiction and

a seal do hereby certify that Wm. B. Ogden, whose name is subscribed to the certificate of acknowledgement of the annexed instrument and therein written, was, at the time of taking such acknowledgement a Notary Public in and for said county and state, duly appointed and qualified, and duly authorized to take the same. And further that I am well acquainted with the handwriting of such Notary Public, and verily believe that the signature to the said certificate of Acknowledgement is genuine. I further certify that said instrument is executed and acknowledged according to the laws of this state.

In Testimony Whereof I have hereunto set my hand and affixed the seal of said court at Montesano, Wash., this 24th day of May, A. D., 1904.

[Seal.]

J. W. STAMPER,

Clerk of Superior Court for Chehalis County.

By E. A. Philbrick, Deputy.

Filed and recorded June 7, 1904.

D. R. SHAMBROOK,

County Clerk.

By Flossie P. Shambrook, Deputy.

Deeds Vol. 49, page 158-9.

STATE OF OREGON,

County of Douglas—ss.

I, E. H. Lenox, County Clerk and ex-officio Recorder of Conveyances, of said Douglas County, State of Oregon, hereby certify that I have prepared the foregoing copy of deed, recorded in Book 49, at page 158-9 of the Deed Records of said County kept in my office, and of which I am keeper, and have com-

pared the same with the original thereof, and that the same is a true and correct transcript of the original record of said deed as recorded in said book, and of the whole thereof.

IN WITNESS WHEREOF, I have hereunto set my hand and affixed my seal of office this the 9th day of March, A. D., 1912.

[Seal.]

E. H. LENOX.

STATE OF OREGON,

Douglas County—ss.

I, G. W. Wonacott, sole Judge of the County Court of the County of Douglas, State of Oregon, hereby certify that the attestation of the foregoing copy of deed is in due form and is made by the proper officer.

Witness my hand at Roseburg, Oregon, this the 9th day of March, 1912.

G. W. WONACOTT,

County Judge.

STATE OF OREGON,

County of Douglas—ss.

I, E. H. Lenox, County Clerk of Douglas County, State of Oregon, and ex-officio Clerk of the County Court of said County, hereby certify that G. W. Wonacott, whose signature is affixed to the foregoing attestation is the Presiding and sold Judge of the County Court of Douglas County, State of Oregon, and is duly commissioned and qualified.

IN WITNESS WHEREOF, I have hereunto set my hand and the seal of said County Court on this

the 9th day of March, A. D., 1912.

E. H. LENOX.

Filed Mar. 15, 1912.

A. M. CANNON,

Clerk U. S. District Court.

[Plaintiff's Exhibit 3.]

ANDREW JOHNSON, ET UX,

to AARON JOHNSON.

This indenture made this 8th day of April in the year of our Lord, One Thousand Nine Hundred and Seven, between Andrew Johnson and Emma Johnson, wife, the parties of the first part and Aaron Johnson the party of the second part, Witnesseth; that the said parties of the first part for and consideration of the sum of other valuable considerations and One (1) Dollars lawful money of the United States to them in hand paid by the said party of the second part the receipt whereof is hereby acknowledged do by these presents Grant, bargain, sell, convey and confirm unto the said party of the second part and to his heirs, executors, administrators and assigns the following described tract, lot or parcel of land, situate, lying and being in the County of Douglas, State of Oregon, and particularly bounded and described as follows, to wit:

The Northwest quarter (NW $\frac{1}{4}$) of Section Ten (10), in Township numbered twenty one (21) south of Range seven (7) west of Willamette Meridian, containing 160 acres according to the United States Government survey thereof, together with all and singular the tenements, hereditaments and appur-

tenances thereunto belonging or in anywise appertaining and the reversion and reversions, remainder and remainders, rents, issues and profits thereof. To have and to hold the said premises unto the said party of the second part and to his heirs, executors, administrators and assigns, forever. And the said parties of the first part for themselves and for their heirs, executors, and administrators do by these presents covenant that they are the owners in fee simple absolute of all and singular the above granted and described premises and the appurtenances; that they have good and lawful right to sell and convey the same; that the same are free from all liens or incumbrances and that they hereby warrant and will forever defend the same from all lawful claims whatsoever.

In Witness Whereof the said parties of the first part have hereunto set their hands and seals the day and year first above written.

Signed sealed and delivered in the presence of
Carl Lovigren,
C. A. Olson.

ANDREW JOHNSON, [Seal.]

EMMA JOHNSON, [Seal.]

STATE OF WASHINGTON,

County of King—ss.

I, C. A. Olson, a Notary Public in and for the State of Washington, residing at Preston, in the above named County and State, duly commissioned, sworn and qualified, do hereby certify that Andrew Johnson and Emma Johnson, his wife, to me known to be the individuals described in and who executed the within

instrument personally appeared before me this day and acknowledged to me that they signed and sealed the same as their free and voluntary act and deed for the uses and purposes therein mentioned.

Given under my hand and official seal this 8th day of April, A. D., 1907.

C. A. OLSON,

Notary Public in and for the State of Washington,
residing at Preston in said County.

[Seal.]

Filed and recorded April 24th, 1907.

Z. N. AGEE,

County Clerk.

By G. V. Wimberly, Deputy.

Vol. 57 Page 103 Deed Records.

STATE OF OREGON,

County of Douglas—ss.

I, E. H. Lenox, County Clerk and ex-officio Recorder of Conveyances, of said Douglas County, State of Oregon, hereby certify that I have prepared the foregoing copy of deed, recorded in Book 57 at page 103, of the Deed Records of said County kept in my office, and of which I am keeper, and have compared the same with the original thereof, and that the same is a true and correct transcript of the original record of said deed as recorded in said Book, and of the whole thereof.

IN WITNESS WHEREOF, I have hereunto set

my hand and affixed my seal of office this the 9th day of March, A. D., 1912.

[Seal.]

E. H. LENOX.

STATE OF OREGON,

Douglas County—ss.

I, G. W. Wonacott, sole Judge of the County Court of the County of Douglas, State of Oregon, hereby **certify** that the attestation of the foregoing copy of deed is in due form and is made by the proper officer.

Witness my hand at Roseburg, Oregon, this the 9th day of March, 1912.

G. W. WONACOTT,
County Judge.

STATE OF OREGON,

County of Douglas—ss.

I, E. H. Lenox, County Clerk of Douglas County, State of Oregon, and ex-officio Clerk of the County Court of said County, hereby certify that G. W. Wonacott, whose signature is affixed to the foregoing attestation is the Presiding and sole Judge of the County Court of Douglas County, State of Oregon, and is duly commissioned and qualified.

IN WITNESS WHEREOF, I have hereunto set my hand and the seal of said County Court on this the 9th day of March, A. D., 1912.

[Seal.]

E. H. LENOX.

Filed Mar. 15, 1912.

A. M. CANNON,

Clerk U. S. District Court.

[Plaintiff's Exhibit 4.]

AARON JOHNSON,

to

NORTH STAR LUMBER CO.

This Indenture made this 21st day of February in the year of our Lord one thousand nine hundred and seven, between Aaron Johnson, an unmarried man, farmer, at Edberg of the Province of Alberta, Canada, party of the first part, and North Star Lumber Company, a corporation organized and existing under the laws of Minnesota of the County of and State of, party of the second part, WITNESSETH, that the said party of the first part in consideration of the sum of Two Thousand Dollars to him in hand paid by the said party of the second part, the receipt whereof is hereby acknowledged does hereby grant, bargain, sell and convey unto the said party of the second part its successors and assigns forever, all that tract or parcel of land lying and being in the County of Douglas and State of Oregon, described as follows, to wit:

The Northwest quarter (NW $\frac{1}{4}$) of Section ten (10), in Township twenty one (21) South, Range seven (7) West, W. M.

To have and to hold the same, together with all the hereditaments and appurtenances thereunto belonging or in anywise appertaining unto the said party of the second part its successors and assigns forever.

And the said Aaron Johnson party of the first part for himself his heirs, executors and administrators does covenant with the said party of the second part its successors and assigns, that he is well seized in fee of the lands and premises aforesaid, and has good right to sell and convey the same in manner and form aforesaid; and that the same are free from all incumbrances and that the above bargained and granted lands and premises, in the quiet and peaceable possession, of the said party of the second part its successors and assigns against all persons lawfully claiming or to claim the whole or any part thereof, the said party of the first part will warrant and defend.

In Testimony Whereof the said party of the first part has hereunto set hand and seal the day and year first above written.

Signed sealed and delivered in presence of
Robert D. Fleming,
John McLeod.

AARON JOHNSON, [Seal.]

TOWN OF CAMROSE,
Northwest Territories,
Alberta, Canada—ss.

On this eighth day of March, A. D., 1907, before me, a Notary Public within and for said County, personally appeared Aaron Johnson and his two witnesses, Robert D. Fleming and John McLeod, to me known to be the persons described in and who executed the within instrument and acknowledged that he

executed the same as their free act and deed.

FRANCOIS ADAM,

a Notary Public.

My Commission Expires December 31st, 1907.

[Seal.]

Filed and recorded April 24th, 1907.

Z. N. AGEE,

County Clerk.

By G. V. Wimberly, Deputy.

Deed Record Vol. 57, page 103.

STATE OF OREGON,

County of Douglas—ss.

I, E. H. Lenox, County Clerk and ex-officio Recorder of Conveyances, of said Douglas County, State of Oregon, hereby certify that I have prepared the foregoing copy of deed, recorded in Book 57 at page 103 of the Deed Records of said County kept in my office, and of which I am keeper, and have compared the same with the original thereof, and that the same is a true and correct transcript of the original record of said deed as recorded in said book, and of the whole thereof.

IN WITNESS WHEREOF, I have hereunto set my hand and affixed my seal of office this the 9th day of March, A. D., 1912.

[Seal.]

E. H. LENOX.

STATE OF OREGON,

Douglas County—ss.

I, G. W. Wonacott, sole Judge of the County Court of the County of Douglas, State of Oregon, hereby

certify that the attestation of the foregoing copy of deed is in due form and is made by the proper officer.

Witness my hand at Roseburg, Oregon, this the 9th day of March, 1912.

G. W. WONACOTT,
County Judge.

STATE OF OREGON,
County of Douglas—ss.

I, E. H. Lenox, County Clerk of Douglas County, State of Oregon, and ex-officio Clerk of the County Court of said County, hereby certify that G. W. Wonacott, whose signature is affixed to the foregoing attestation is the Presiding and sole Judge of the County Court of Douglas County, State of Oregon, and is duly commissioned and qualified.

IN WITNESS WHEREOF, I have hereunto set my hand and the seal of said County Court on this the 9th day of March, A. D., 1912.

[Seal.]

E. H. LENOX,

Filed Mar. 15, 1912.

A. M. CANNON,
Clerk U. S. District Court.

[Plaintiff's Exhibit 5.]

Hoquiam, Washington, Mar. 28th 1907. No.....

THE FIRST NATIONAL BANK.

of Hoquiam.

Pay to the order of First Nat. Bank\$2000.00

Two thousandDollars.

F. F. WILLIAMS.

Paid Apr. 12, 1907, The First National Bank, Hoquiam, Wash.

Filed Mar. 15, 1912.

A. M. CANNON,
Clerk U. S. District Court.

[Defendants' Exhibit A.]

*In the Circuit Court of the State of Oregon
for Douglas County.*

JOHN W. JOHNSON,

Plaintiff,

vs.

AARON JOHNSON and ELINE ENGEBRITSON,
Defendants.

Petition for Correcting Clerical Error in Judgment.
To the Honorable J. W. Hamilton, Judge of the above
entitled Court:

The undersigned, your petitioner, respectfully represents that on the first day of April, A. D., 1907, John W. Johnson began an action in the above entitled Court against the above named defendants Aaron Johnson and Eline Engebritson to recover the sum of Two Hundred Seventy-five (275) Dollars in gold coin of the United States of America, together with interest thereon in like gold coin from the 2nd day of March, 1904, at the rate of 8 per cent per annum less the sum of Twenty (20) Dollars paid April 8, 1904, and the further sum of Twenty (20) Dollars, paid May 10, 1904, and further sum of Thirty (30) Dollars attorneys' fees and plaintiff's costs and disbursements in said action to be taxed;

That thereafter and on the same day the plaintiff in said action cause to be filed therein his affidavit for writ of attachment and his undertaking for writ of attachment, both said affidavit and undertaking being in form and substance as required by law ;

That thereupon and on the said first day of April, 1907, the County Clerk of said Douglas County, and ex-officio clerk of the above entitled court, duly issued a writ of attachment directed to the sheriff of Douglas County, Oregon, commanding him to levy upon and attach sufficient property of the above named defendants to satisfy the demand of the said plaintiff in said action ;

That thereafter and on said first day of April, 1907, the sheriff duly returned his writ of attachment :

That thereafter said sheriff of Douglas County, Oregon duly and regularly filed with said county clerk his certificate wherein the said sheriff certified that he had on the first day of April 1907, duly levied upon seized and attached all of the right, title and interest of the defendant Aaron Johnson in and to the Northwest quarter of Section 10, Township 21 South, Range 7 West of the Willamette Meridian, Douglas County, State of Oregon ;

That said certificate of attachment was thereafter and on the first day of April, 1910, duly filed by said Clerk in said Court and cause and was thereafter duly and regularly recorded in the record of attachments of said Court and said County in volume..... in pagethereof ;

That thereafter, to wit: on May 16, 1908, such pro-

ceedings were had that the said John W. Johnson plaintiff in said action recovered judgment by consideration of the above entitled Court against the said defendants Aaron Johnson and Eline Engebritson for the full sum of Three hundred fifteen (315) Dollars, with interest thereon at the rate of 8 per cent per annum from the 16th day of May, 1908, the further sum of Thirty (30) dollars attorneys fees and disbursements taxed at fourteen and 50|100 (14.50) dollars; and an order for the sale of the property attached in said action as aforesaid;

That in entering said judgment by the misprision of the clerk of said court in the judgment and order of sale entered in said action, the date of the attachment was described as the 21st day of April, 1907, instead of the first day.

Your petitioner respectfully refers your Honor to the complaint in said action, the affidavit and undertaking for attachment and the certificate of the sheriff levying and attaching said real property together with the other papers filed in said action and the journal entries made therein for the verification and proof of the statements in this petition made.

Wherefore, Your petitioner prays for an order of this Court correcting the misprision of the Clerk of this court in inserting in said judgment and order of sale the 21st day of April, 1907, instead of the first day of April, 1907;

That the said judgment and order of sale be corrected by reciting the date of the attachment in accordance with the facts, to wit: as having been made on

the first day of April, 1907, and directing the sale of all the right, title and interest of the said defendants Aaron Johnson and Eline Engebritson in and to said premises on the first day of April, 1907, or at any time thereafter and that this order be made as of the 16th day of May, 1908;

And your petitioner will ever pray.

JOHN W. JOHNSON,

Petitioner.

By O. P. Coshow of his Attorneys.

STATE OF OREGON,

County of Douglas—ss.

I, O. P. Coshow, being first duly sworn say that I was an attorney for John W. Johnson in the action described in the foregoing petition and I am still such attorney for the purpose of this petition;

That I have prepared and verified this petition for and in behalf of the said John W. Johnson who is not a resident of Douglas County, Oregon, so as to make this verification at this time.

That the foregoing petition is true as I verily believe.

O. P. COSHOW.

Subscribed and sworn to before me this 27 day of June, 1911.

E. H. LENOX,

County Clerk.

By Carl E. Wimberly, Deputy.

[Seal.]

Endorsed as follows:

No.

In the Circuit Court
of the State of Oregon
for the County of Douglas.

JOHN W. JOHNSON,

Plaintiff.

vs.

AARON JOHNSON and ELINE ENGBRITSON,
Defendants.

Petition for correcting clerical
error in judgment.

Filed June 27, 1911.

E. H. LENOX,

Clerk.

By Carl E. Wimberly, Deputy.

From the law office of
COSHOW & RICE
Attorneys for Plaintiff
Roseburg, Oregon.

STATE OF OREGON,

County of Douglas—ss.

I, E. H. LENOX, County Clerk of the above named county, and ex-officio clerk of the circuit court for said County, do hereby certify that the foregoing copy of Petition, has been by me compared with the original, and that it is a transcript thereof and of the whole of such original Petition as the same appears on file in my office, care and custody.

IN TESTIMONY WHEREOF, I have hereunto set my hand and affixed the seal of said Court this 9th

day of March, A. D., 1912.

[Seal.]

E. H. LENOX,

Clerk.

By Blanche Reed, Deputy.

Filed Mar. 15, 1912.

A. M. CANNON,

Clerk U. S. District Court.

[Defendants' Exhibit B.]

*In the Circuit Court of the State of Oregon
for Douglas County.*

Be It Remembered that at a regular term of the Circuit Court of the State of Oregon for Douglas County, begun and held in the court room at the court house in Roseburg, Oregon, on Monday the 22nd day of May, 1911, at which were present:

Hon. JOHN S. COKE,

Judge.

GEO. M. BROWN,

Pros. Atty.

E. H. LENOX,

Clerk.

GEO. K. QUINE,

Sheriff.

Among other proceedings the following was had on Thursday the 29th day of June, 1911, being the thirteenth judicial day of the term to wit: Judge J. W. Hamilton, Presiding.

JOHN W. JOHNSON,

Plaintiff,

vs.

AARON JOHNSON and ELINE ENGBRITSON,
Defendants.

JUDGMENT.

This cause coming on to be heard upon the petition of the plaintiff, John W. Johnson, for the correction of a clerical error in the judgment heretofore, to wit: on the 16th day of May, 1908, duly rendered and entered in the above entitled court and cause in favor of the above named plaintiff and against the above named defendants to recover the sum of \$315.00 with interest thereon at the rate of 8 per cent per annum from the said 16th day of May, 1908, and the sum of \$30.00 attorney's fees and plaintiff's costs and disbursements taxed at \$14.50 the plaintiff appearing by O. P. Coshov of his attorneys and the defendants appearing not;

And it appearing to the satisfaction of the Court that on the 1st day of April, 1907, at the suit of the plaintiff John W. Johnson, a writ of attachment was duly issued by the clerk of said court directed to the sheriff of Douglas County, Oregon, under and by virtue of which writ of attachment the said sheriff did on the said 1st day of April, 1907, duly and regularly attach the Northwest quarter of Section Ten (10), Township twenty one (21) South, Range Seven (7) West, of the Willamette Meridian, in Douglas County, State of Oregon;

The said real property so attached was ordered to be sold and the said judgment entered in said cause on the said 16th day of May, 1908, but by a misprision of the clerk of this court in said judgment and

order of sale the date of that attachment of said real property was stated to be the 21st day of April, 1907, instead of the 1st day of April, 1907;

And it fully appearing to the satisfaction of the court that said error was clerical and should be corrected so as to state the truth and facts in regard to said attachment;

And it further appearing to the satisfaction of the court that the defendants were on the 16th day of May, 1908, jointly and severally indebted to the plaintiff in the sum of \$315.00 on a promissory note and such sum as attorney's fees as the Court should adjudge reasonable to be allowed plaintiff for instituting said action for the collection of said note and that the defendants each have been duly served with summons by publication by order of this court and have defaulted and said default was duly entered against them and each of them.

It is therefore, ordered, adjudged and considered that the plaintiff, John W. Johnson, have and recover off and from the defendants Aaron Johnson and Eline Engebritson and each of them the sum of \$315.00 with interest thereof at the rate of 8 per cent from the 16th day of May, 1908 and the further sum of \$30.00 attorney's fees and the further sum of \$14.50 plaintiff's costs and disbursements;

It is further ordered that the said real property attached in said action on the 1st day of April, 1907, and all of the right title and interest of the said defendants Aaron Johnson and Eline Engebritson or either of them in and to said property on the 1st day

of April, 1907, or at any time since, be sold in the manner prescribed by the law of this state for the sale of real property under execution and the proceeds of said sale be applied;

First: To the payment of the costs and expenses of said sale;

Second: To the costs and disbursements of this action including the amount allowed plaintiff as attorney's fees; and

Third: To the payment of the said sum so found due and owing from the defendants to the plaintiff, the sum of \$315.00 with interest at the rate of 8 per cent per annum from the 16th day of May, 1908, and that the overplus, if any, be paid to the clerk of this Court for the benefit of the defendants as their interests may appear, and that execution issue to enforce this judgment;

It is further ordered that this judgment be entered for and as of the 16th day of May, 1908.

(Record signed),

J. W. HAMILTON,

Judge.

Attest:

E. H. Lenox, Clerk.

Vol. 20 Page 345.

STATE OF OREGON,

County of Douglas—ss.

I, E. H. LENOX, County Clerk of the above named County, and ex-officio Clerk of the Circuit Court for said County, do hereby certify that the foregoing copy of Order has been by me compared with the orig-

inal, and that it is a transcript thereof and of the whole of such original Order as the same appears on record in my office, care and custody.

IN TESTIMONY WHEREOF, I have hereunto set my hand and affixed the seal of said Court this 9th day of March, A. D., 1912.

[Seal]

E. H. LENOX,

Clerk.

By Blanche Reed, Deputy.

Filed Mar. 15, 1912.

A. M. CANNON,

Clerk U. S. District Court.

[Defendant's Exhibit C.]

Sheriff's Deed of Execution.—No. 46.

Printed and for sale by Glass & Prudhomme, Portland, Or.

THIS INDENTURE, Made the tenth day of November, in the year of our Lord one thousand nine hundred nine, between B. Fenton, Sheriff of the County of Douglas, State of Oregon, the party of the first part, and John W. Johnson, of Hoquiam, Washington, the party.... of the second part,

WITNESSETH, that, whereas, by virtue of a Writ of Execution issued out of and under the seal of the circuit court of the State of Oregon, for the said county of Douglas, dated the fourteenth day of July, A. D., 1908, upon a judgment recovered in the said court on the sixteenth day of May, 1908, in favor of John W. Johnson, Plaintiff, and against Aaron Johnson and

Eline Engebritson, Defendants, to the said Sheriff directed and delivered, commanding him that out of the personal property of said judgment debtors in his County...., he.... should cause to be made certain moneys in the said Writ specified, and if sufficient personal property of the said judgment debtors could not be found, then he should cause the amount of said judgment to be made out of the real property belonging to said judgment debtors on the 21st day of April, A. D., 1907, or at any time afterwards.

AND WHEREAS, because sufficient personal property of said judgment debtors.... could not be found, whereof the said Sheriff could cause to be made the moneys specified in said Writ, the said Sheriff did, on the fourteenth day of July, A. D., 1908, in obedience to said command, levy on, take and seize all the right, title, interest and claim which the said judgment debtors so had to the lands, tenements, real estate and premises hereinafter particularly set forth and described, with the appurtenances, and did, on the twenty ninth day of August, A. D., 1908, sell all the right, title, interest and claim of the said judgment debtors in and to the said premises at public auction, in front of the Court House, in Roseburg, in said County of Douglas, between the hours of nine in the morning and four in the afternoon of that day, namely, at one o'clock P. M., after having first given due notice of the time and place of such sale according to law; at which sale all the right, title, interest and claim of the said judgment debtors in and to the said premises, were struck off and sold to the said party of the

second part for the sum of Three Hundred Eighty and 4|100 (380.04) Dollars, Gold coin of the United States of America, the said party of the second part, he being the highest bidder and that being the highest sum bid for the same, whereupon the said Sheriff, after receiving from the said purchaser the said sum of money so bid as aforesaid, gave to the said party of the second part such certificate of said sale as is by law directed to be given, and the matters contained in such certificate were substantially stated in said Sheriff's return of his proceedings upon said Writ, to the County Clerk of the said County of Douglas. And whereas, the said Court, by an order dated the twelfth day of October, 1908, confirmed said sale, and one year have expired since the confirmation of said sale by said Court without any redemption of the said premises having been made:

NOW THIS INDENTURE WITNESSETH, that the said B. Fenton, the Sheriff aforesaid, by virtue of the said Writ, and in pursuance of the statute in such case made and provided, for and in consideration of the said sum of money to him in hand paid as aforesaid by the said party of the second part, the receipt whereof is hereby acknowledged, has granted, bargained, sold, conveyed and confirmed, and by these presents does grant, bargain, sell, convey and confirm unto the said party of the second part, and to his heirs and assigns forever, all the right, title, interest and claim which the said judgment debtors Aaron Johnson and Eline Engebritson, or either of them, had on the said 21st day of April, A. D., 1907,

or at any time afterwards, or now have, in and to all that certain lot, piece or parcel of land, situate, lying and particularly described as follows, towit:

The North West quarter of Section 10, Township 21 South, Range 7 West, of Willamette Meridian, Douglas County, Oregon, together with all and singular the hereditaments and appurtenances thereunto belonging or in anywise appertaining.

TO HAVE AND TO HOLD the said premises, with the appurtenances, unto the said party of the second part, his heirs and assigns forever, as fully and absolutely as the said Sheriff can, may or ought to, by virtue of the said Writ, and of the statute in such case made and provided, grant, bargain, sell, convey and confirm the same.

IN WITNESS WHEREOF, the said Sheriff, the said party of the first part, has hereunto set his hand and seal the day and year first above written.

B. FENTON, [Seal.]

Sheriff of the County of Douglas, Oregon.

Signed, Sealed and Delivered in the Presence of

R. T. Ashworth,

Andrew R. Markee,

STATE OF OREGON,

County of Douglas—ss.

On this 10th day of November, A. D., one thousand nine hundred nine, before me, Oliver P. Coshow, a Notary Public in and for said Douglas County, duly commissioned and sworn, personally appeared the within named B. Fenton, Sheriff of the County of

Douglas, State of Oregon, whose name is subscribed to the foregoing instrument as a party thereto, personally known to me to be the individual described in and who executed the said foregoing instrument, and acknowledged to me that he executed the same freely and voluntarily, and for the uses and purposes therein mentioned.

IN WITNESS WHEREOF, I have hereunto set my hand and affixed my official seal the day and year in this certificate first above written.

[Seal.]

OLIVER P. COSHOW,
Notary Public for Oregon.

2.00 Pd.

Indexed.

Compared.

John W. Johnson. Sheriff's Deed on Execution.
Dated, 1..... Recorded at the request of Coshow & Rice, Nov. 20, A. D., 1909, at..... minutes pastM., in 63 of Deeds, page 364.

E. H. LENOX,
Recorder of Conveyances.
By Deputy.

Filed Mar. 15, 1912.

A. M. CANNON,
Clerk U. S. District Court.

And afterwards, to wit, on the 25 day of September, 1912, there was duly filed in said Court, a Petition for Appeal, in words and figures as follows, to wit:

[Petition for Appeal.]

*In the District Court of the United States for the
District of Oregon.*

NORTH STAR LUMBER COMPANY, a corpora-
tion,

Plaintiff,

vs.

JOHN W. JOHNSON, HERMAN WINTERS and
JOHN WINTERS,

Defendants.

To the Honorable Judge of the District Court of the
United States, for the District of Oregon:

The above named defendant, John W. Johnson, feeling himself aggrieved by the decree made and entered in this cause on the 17 day of April, A. D., 1912, does hereby appeal from said decree to the Circuit Court of Appeals for the Ninth Circuit, for the reasons specified in the assignment of errors, which is filed herewith, and he prays that his appeal be allowed and that citation issue as provided by law, and that a transcript of the record, proceedings, and papers upon which said decree was based, duly authenticated, may be sent to the United States Circuit Court of Appeals for the Ninth Circuit, sitting at San Francisco, California.

And your petitioner further prays that the proper order touching the security to be required of him to perfect his appeal be made.

MORGAN & BREWER,

JOHN VAN ZANTE,

Solicitors.

The petition granted and the appeal allowed upon giving bond conditioned as required by law in the sum of Five Hundred (\$500.00) Dollars.

R. S. BEAN,

Judge.

[Endorsed]: Petition for Appeal. Filed Sept. 25, 1912.

A. M. CANNON,

Clerk U. S. District Court.

And afterwards, to wit, on the 25 day of September, 1912, there was duly filed in said Court, Assignments of Error, in words and figures as follows, to wit:

[Assignments of Error.]

*In the District Court of the United States for the
District of Oregon.*

NORTH STAR LUMBER COMPANY, a corporation,
.

Plaintiff.

vs.

JOHN W. JOHNSON, HERMAN WINTERS and
JOHN WINTERS,

Defendants.

And now on this 25 day of September, A. D., 1912, comes the defendant, John W. Johnson, by his solicitors, Morgan & Brewer, and claims that the decree entered in the above cause on the 17 day of April, 1912, is erroneous and unjust to the defendant, because,

First. The Court erred in overruling the defendant's exceptions to the original bill of complaint for impertinence, for this, that the trial court was without jurisdiction to examine into the record of the Oregon Court in this collateral proceeding.

Second. The Court erred in overruling like exceptions to the amended bill of complaint of the plaintiff.

Third. The Court erred in holding that the requisite diversity of citizenship existed to entitle the Court to entertain jurisdiction, for this, that the plaintiff is a citizen of Minnesota, and the defendants are citizens of the State of Washington.

Fourth. The Court erred in authorizing this collateral attack upon the judgment of the Oregon Court and in holding that such judgment was open to collateral attack in this proceeding, for this, that while the Court and counsel concedes that the property was regularly seized by a court of competent and general jurisdiction which proceeded to judgment and sale, this Court would examine into the record of the Oregon Court and would hold that the Oregon judgment was void because one of the affidavits on which publication was made by plaintiff, was made before a Washington Notary Public, (this being one of several affidavits), and that therefore, this Court could and would set aside the judgment of the Circuit Court of Oregon.

Fifth. The court erred in holding that the affidavit of publication made by plaintiff before the Washington Notary Public, was an essential requisited to a valid order by the Circuit Court of Oregon for a

publication of summons, for this, that 1st, the Federal Courts will not investigate the record of a state court of general jurisdiction for defects and informalities, and 2nd, the presumptions are in favor of the judgment of the State Court, and the trial court was not authorized in assuming that the state court based its order entirely upon the defective affidavit made before the Washington Notary Public, and ignoring the sheriff's return "not found," and the other affidavits found in the record of the Oregon Court.

Sixth. The Court erred in finding in this collateral proceeding, that the affidavit, made before the Washington Notary Public, was a mere nullity, that an essential step was entirely omitted, and that the order of publication, based thereon, was ineffectual for any purpose.

Seventh. The Court erred in entertaining this collateral attack upon the judgment of the circuit court of Oregon, where the order for publication of summons recited, as it did in this case, that it appeared to the "satisfaction of the Court," that the defendants in that case were not residents of the State of Oregon, especially where the record shows other affidavits than the defective one, which the Court calls a nullity, were on file in said cause, and the Court erred in finding that an essential step was in fact entirely omitted, in view of the other affidavits on file before the Oregon Court, the sheriff's return, and the solemn finding of the Oregon Court.

Eighth. The Court erred in holding that the judgment of the Oregon Court was void, for two reasons,

1st, that the trial court should not, under the law with reference to federal courts, have entertained this collateral attack on such judgment, and 2nd, for the reason that the judgment was not, in fact, void, and would not have been so held by the state court in case of a direct attack.

Ninth. The Court erred in finding that the plaintiff was the owner in fee of the property involved in the action, and in holding that the defendant, John W. Johnson, was not such owner, and in quieting the title in favor of the said North Star Lumber Company, and against the said John W. Johnson.

Tenth. The Court erred in ordering that the deed, bearing date of the 20th day of November, 1909, executed by the sheriff of Douglas County to the defendant, John W. Johnson, be cancelled and held for nullity.

Eleventh. The Court erred in entering its decree for the plaintiff and against the defendant, John W. Johnson, quieting the title for the plaintiff and as against the defendant, John W. Johnson.

WHEREFORE, the defendant prays that the said decree be reversed, and the circuit court be directed to dismiss the bill for want of equity in the plaintiff as against the defendant.

MORGAN & BREWER,
JOHN VAN ZANTE,
Solicitors.

[Endorsed]: Assignment of Errors. Filed Sep. 25, 1912.

A. M. CANNON,
Clerk U. S. District Court.

And afterwards, to wit, on the 14 day of October, 1912, there was duly filed in said Court, a Bond on Appeal, in words and figures as follows, to wit:

[Bond on Appeal.]

*In the District Court of the United States for the
District of Oregon.*

NORTH STAR LUMBER COMPANY, a corporation,

Plaintiff,

vs.

JOHN W. JOHNSON, HERMAN WINTERS and
JOHN WINTERS,

Defendants.

KNOW ALL MEN BY THESE PRESENTS, that we, John W. Johnson as principal and Massachusetts Bonding & Insurance Company, as sureties, acknowledged ourselves to be jointly indebted to the North Star Lumber Co. and Herman Winters, appellants in the above cause in the sum of FIVE HUNDRED DOLLARS (\$500), conditioned that, whereas on the 17 day of April, 1912, in the Circuit Court of the United States for the District of Oregon, in a suit depending in that Court, wherein North Star Lumber Co., was plaintiff and John W. Johnson and Herman Winters were defendants, numbered on

Equity Docket as 3719, a decree was rendered against the said John W. Johnson, and the said John W. Johnson having obtained an appeal to the Circuit Court of Appeals of the Ninth Circuit, and filed a copy thereof in the office of the clerk of the court to reverse said decree, and a citation directed to the said North Star Lumber Co., and the said Herman Winters, citing and admonishing them to be and appear at a session of the U. S. Circuit Court of Appeals for the 9th Circuit, to be holden in the City of San Francisco in the State of California on the third day of February, 1913, next.

Now, if the said John W. Johnson shall prosecute his appeal to effect and answer all damages and costs, if he fail to make his plea good, then the above obligation to be void, else to be and remain in full force and virtue.

JOHN W. JOHNSON,
MASSACHUSETTS BONDING & INSURANCE
COMPANY,

By Geo. R. Rodgers, Attorney in Fact.

By James H. Hart, Attorney in Fact.

Approved this 14th day of October, 1912.

R. S. BEAN,

District Judge.

[Endorsed]: Bond on Appeal. Filed Oct. 14,
1912.

A. M. CANNON,
Clerk U. S. District Court.

And afterwards, to wit, on the 14 day of October, 1912, there was duly filed in said Court, a Citation on Appeal, in words and figures as follows, to wit:

[Citation on Appeal.]

UNITED STATES OF AMERICA,
District of Oregon—ss.

To the North Star Lumber Company, a Corporation,
Herman Winters and John Winters, Greeting:

WHEREAS, John W. Johnson, one of Defendants has lately appealed to the United States Circuit Court of Appeals for the Ninth Circuit from a decree rendered in the Circuit Court of the United States for the District of Oregon, in your favor, and has given the security required by law; YOU ARE, therefore, hereby, cited and admonished to be and appear before said United States Circuit Court of Appeals for the Ninth Circuit, at San Francisco, California, within thirty days from the date hereof, to show cause, if any there be, why the said decree should not be corrected, and speedy justice should not be done to the parties in that behalf.

GIVEN under my hand, at Portland, in said District, this 14th day of October, in the year of our Lord, one thousand, nine hundred and twelve.

R. S. BEAN,
Judge.

Due service of within Citation on Appeal is hereby

admitted at Portland, Oregon, this 14th day of October, 1912.

VEAZIE & VEAZIE,
Solicitors for Plaintiff.

[Endorsed]: Citation on Appeal. Filed Oct. 14, 1912.

A. M. CANNON,
Clerk U. S. District Court.

And afterwards, to wit, on Tuesday, the 12 day of November, 1912, the same being theJudicial day of the Regular November, 1912, Term of said Court; Present: the Honorable R. S. BEAN, United States District Judge presiding, the following proceedings were had in said cause, to wit:

[Order Enlarging Time to File Record.]

*In the District Court of the United States for the
District of Oregon.*

NORTH STAR LUMBER COMPANY, a corporation,

Plaintiff,

vs.

JOHN W. JOHNSON, HERMAN WINTERS and
JOHN WINTERS,

Defendants.

No. 3719.

November 12, 1912.

Now, at this day, for good cause shown, it is ORDERED that the defendant's time for filing and docketing the record on appeal in this cause in the United

States Circuit Court of Appeals, Ninth Circuit, be and the same hereby is enlarged and extended to and including December 31, 1912.

R. S. BEAN,
Judge.

IN THE
United States Circuit Court of Appeals
NINTH CIRCUIT

JOHN W. JOHNSON, et al,
Appellants.

—vs—

NORTH STAR LUMBER COM-
PANY, a corporation,
Respondent.

BRIEF OF APPELLANT

MORGAN & BREWER,

Hoquiam, Wash.

JOHN VAN ZANTE,

Spalding Building, Portland, Oregon,

Solicitors for Appellant.

IN THE
United States Circuit Court of Appeals
NINTH CIRCUIT

JOHN W. JOHNSON, et al,
Appellants.

—vs—

NORTH STAR LUMBER COM-
PANY, a corporation,
Respondent.

} BRIEF

STATEMENT OF THE CASE.

This is a suit to remove a cloud from title to certain real property in the State of Oregon; the Respondent, the plaintiff below, is a citizen of the State of Minnesota; the Appellant, John W. Johnson, and the defendants, Herman Winters and John Winters, are citizens of the State of Washington; none of the parties to the action are citizens of the State of Oregon. The land in question is vacant, unoccupied land and is not in possession of either parties to the suit, or any other person. Both parties deraign title

through Aaron Johnson. The plaintiff, respondent here, by deed from Aaron Johnson to Andrew Johnson of date May 24th, 1904, recorded June 7th, 1904; deed from Andrew Johnson to Aaron Johnson of date, April 8th, 1907, delivered April 12th and recorder on the 24th of the same month; a deed from Aaron to respondent of date February 21st, 1907, delivered April 12th (Record 58-61) and recorded April 24th, 1907; The defendant claims through a sheriff's deed made in pursuance of sale under an execution issued on a judgment recovered in the State Court by defendant against Aaron Johnson, a non-resident of the State, in an action at law commenced on April 1st, 1907, and the attachment of property in suit as the property of Aaron Johnson, and the subsequent service of summons upon him by publication. It will be observed that Aaron Johnson had previously deeded to the North Star Lumber Company, on the 21st day of February, 1907, and that he afterward received the title from Andrew Johnson by deed of April 8th, 1907, both of which deeds were delivered April 12th and recorded April 24th, 1907, or twenty-four days after the attachment of property involved in this suit.

The plaintiff below brought this suit to quiet title, alleging defects and informalities in the attachment proceeding in the Oregon State Court. The appellants promptly challenged the jurisdiction of the Court, and the sufficiency of the allegations of the bill on the ground that the Federal Courts would not examine into the records of the Oregon State

Court for defects and informalities in that record. After the appellant's exceptions to the bill and to the jurisdiction of the Court had been overruled, the appellant answered and set up affirmatively the record in the State Court. At the close of the plaintiff's testimony the appellant again challenged the jurisdiction of the Court and the sufficiency of the proof upon the grounds mentioned. The plaintiff had by way of proof, put in evidence the deeds showing his title, and the record of the State Court and based his right to recover solely upon the defects and informalities of that record. It seems to be conceded that if the informalities in the Oregon Record will not be inquired into, or if they are insufficient to invalidate the Oregon judgment, then the respondent is not entitled to have its title quieted.

There is no such diversity of citizenship in this action as will authorize the trial court to take jurisdiction by reason of diversity alone, the respondent being a citizen of Minnesota and the appellant and defendants, citizens of the State of Washington. The jurisdiction of the trial court rests entirely upon the grounds that the property, title to which is to be quieted, is within the State of Oregon. We mention this fact in view of the trial court's statement on Page 48 of the record, where he says: (referring to the jurisdiction of the trial court)

"But it has jurisdiction to entertain a bill to quiet title to real property or remove a cloud

therefrom where the requisite diversity of citizenship exists."

The particular defect in the record of the Oregon Court, relied upon by the respondent and found by the trial court to be the fatal defect, was the fact that an affidavit, otherwise regular, for publication of summons, made by John W. Johnson, the plaintiff in the Oregon Court, was taken within the State of Washington and before a Washington notary public. The affidavit referred to is shown by the record in this cause on Pages 84, 85 and 86, and the particular complaint as to this affidavit is founded upon the statute of Oregon, then in force (since amended), (Sec. 819, B & C An. Laws) which required an affidavit taken in another State, before it could be used, must be certified by Commissioner appointed by the Governor to take depositions and affidavits in such State, or by court having a seal and clerk. The various steps of the Oregon Court, in the action begun by appellant here and through which he acquired his title, were as follows:

The plaintiff in the State Court, John W. Johnson, the appellant here, commenced an action in the Oregon Court upon the first day of April, 1907, against Aaron Johnson and Eline Engebritson. His petition was filed in the Circuit Court of the State of Oregon for Douglas County on this day. (Pages 69 to 71 of record). Affidavit for attachment was made and filed on this day. (Pages 72 and 73). Bond for at-

attachment was filed on the same day. Levy and seizure under attachment was made by Sheriff of Douglas County on this day. Summons was issued and placed in the hands of the sheriff on this day, and return "not found" made May 8th, 1907. Writ of Attachment was issued by Clerk of Court on said April 1st, 1907, and Writ filed May 8th, 1907, showing levy on the first day of April, 1907. On the 20th of May, 1907 an order was made continuing the cause for service. (Pages 81 and 82 of Record). On the 9th day of September, 1907, the plaintiff through his attorneys made a motion for service of summons by publication (Page 82) and supported such motion by two affidavits, one of O. P. Coshow, made in Oregon, regular in all respects, and the other the affidavit of John W. Johnson, made in Washington made before Chas. W. Hodgdon, a Washington Notary Public, the same being the defective affidavit which the respondent relies upon to invalidate the Oregon Judgment. (Pages 82, 83, 84, 85 and 86 of Record). On the same day G. W. Wonacott, County Judge for Douglas County, Oregon, made an order for the publication of summons but as we understand it, no publication was made upon this order. On the 11th day of October, the plaintiff, through his attorneys, Coshow & Rice, made a second motion for an order for the publication of summons, and this was supported by affidavit of O. P. Coshow as to the non-residence of the defendants, and by affidavit of Evelyn Johnson, both of which affidavits were made in Oregon and were regular, in support of such

motion for publication; Thereupon the Oregon Court made the following order:

“It appearing to the satisfaction of the Court that neither of the Defendants above named can be found within the State of Oregon, and that a cause of action exists against both of said Defendants and that both of said Defendants are proper parties to the above entitled action; and it appearing to the satisfaction of the Court that the postoffice address of neither of the Defendants is known and cannot be found with reasonable diligence, it is

ORDERED that both of said Defendants be served with Summons by publication in the Roseburg Review for a period of six successive weeks. Dated this 11th day of October, 1907.

J. W. Hamilton,
Judge of said Court.”

(Stipulation on Page 66 of the record shows this Order which appears unsigned on Page 95 of Record to have been in fact signed.)

Thereafter proceedings were had in the Oregon Court whereby the cause proceeded regularly to judgment, foreclosure and sale, and deed to this appellant. As before pointed out the only defect in the Oregon Record was the making of the affidavit of John W. Johnson before a Washington Notary Public.

The Trial Court in this suit took the view that it would examine into the Oregon record, search out this defective affidavit and set aside the Oregon judgment. And this is the sole issue in this case at this time. As we have said, it seems to be conceded that the Oregon record is proof against attack except as to this affidavit and that, unless the decision of the trial court in this suit holding such affidavit to be defective, and that the Federal Court will search out such defect, is correct, and is sustained, then title is in appellant and the respondent's suit must fail.

It will be evident from what has been said and the fact is, that this suit is brought for the sole purpose of overturning the decision of the Oregon Court; it has no other purpose. (Bill of Complaint, Record Page 1-6). Its sole purpose is a review of the judgment of the Oregon Court in another forum and without the formalities of an appeal. It is also evident these defects are to be tested and were tested solely by an examination of the record. It does not appear why this action was not brought in the State Court. The Circuit Court of Douglas County, Oregon, was open to the plaintiff in a suit to quiet their title and was open to them by way of an appeal from or modification of judgment of the Circuit Court of Oregon. Neither of these methods were adopted, but rather this citizen of Minnesota proceeded against these citizens of Washington in the United States Circuit Court for Oregon in a suit whose sole purpose

is to overturn the judgment and decree of the Oregon Court.

ASSIGNMENTS OF ERROR.

First: The Court erred in overruling the defendant's exception to the original bill of complaint for impertinence, for this, that the trial court was without jurisdiction to examine into the record of the Oregon Court in this collateral proceeding.

Second: The Court erred in overruling like exceptions to the amended bill of complaint of the plaintiff.

Third: The Court erred in holding that the requisite diversity of citizenship existed to entitle the Court to entertain jurisdiction, for this, that the plaintiff is a citizen of Minnesota, and the defendants are citizens of the State of Washington.

Fourth: The Court erred in authorizing this collateral attack upon the judgment of the Oregon Court and in holding that such judgment was open to collateral attack in this proceeding, for this, that while the Court and counsel concedes that the property was regularly seized by a court of competent and general jurisdiction which proceeded to judgment and sale, this Court would examine into the record of the Oregon Court and would hold that the Oregon judgment was void because one of the affidavits on which publication was made by plaintiff,

was made before a Washington Notary Public, (this being one of several affidavits), and that therefore, this Court could and would set aside the judgment of the Circuit Court of Oregon.

Fifth: The court erred in holding that the affidavit of publication made by plaintiff before the Washington Notary Public, was an essential requisite to a valid order by the Circuit Court of Oregon for a publication of summons, for this, that 1st, the Federal Courts will not investigate the record of a state court of general jurisdiction for defects and informalities, and 2nd, the presumptions are in favor of the judgment of the State Court, and the trial court was not authorized in assuming that the state court based its order entirely upon the defective affidavit made before the Washington Notary Public, and ignoring the sheriff's return "not found", and the other affidavits found in the record of the Oregon Court.

Sixth: The Court erred in finding in this collateral proceeding, that the affidavit, made before the Washington Notary Public, was a mere nullity, that an essential step was entirely omitted and that the order of publication, based thereon, was ineffectual for any purpose.

Seventh: The Court erred in entertaining this collateral attack upon the judgment of the circuit court of Oregon, where the order for publication of summons recited, as it did in this case, that it appeared

to the "satisfaction of the Court", that the defendants in that case were not residents of the State of Oregon, especially where the record shows other affidavits than the defective one, which the Court calls a nullity, were on file in said cause, and the Court erred in finding that an essential step was in fact entirely omitted, in view of the other affidavits on file before the Oregon Court, the sheriff's return, and the solemn finding of the Oregon Court.

Eighth: The Court erred in holding that the judgment of the Oregon Court was void, for two reasons, 1st, that the trial court should not, under the law with reference to federal courts, have entertained this collateral attack on such judgment, and 2nd, for the reason that the judgment was not, in fact, void, and would not have been so held by the state court in case of a direct attack.

Ninth: The Court erred in finding that the plaintiff was the owner in fee of the property involved in the action, and in holding that the defendant, John W. Johnson, was not such owner, and in quieting the title in favor of the said North Star Lumber Company, and against the said John W. Johnson.

Tenth: The Court erred in ordering that the deed, bearing date of the 20th day of November, 1909, executed by the sheriff of Douglas County to the defendant, John W. Johnson, be cancelled and held for nullity.

Eleventh: The Court erred in entering its decree for the plaintiff and against the defendant, John W. Johnson, quieting the title for the plaintiff and as against the defendant, John W. Johnson.

WHEREFORE, The defendant prays that the said decree be reversed, and the circuit court be directed to dismiss the bill for want of equity in the plaintiff as against the defendant.

ARGUMENT AND AUTHORITIES

The issues therefore, it seems to us, in this case are limited to these four questions which we state in the affirmative.

- 1st: The federal court will not in this proceeding search the record of the Oregon State Court for defects and informalities or errors apparent upon and judged by the face of the record.
- 2d: The attachment of real property and its subsequent sale under a judgment of the state court will give the state court jurisdiction which will not be attacked in a collateral proceeding in the Federal court.
- 3d: Where the court makes a solemn finding, that it appears to its satisfaction, that the defendant cannot be found within the state, and makes an order of publication of summons,

such finding is proof against collateral attack.

4th: There was sufficient showing in this case to justify the Oregon Court in its finding, that it appeared to the satisfaction of the Court that the defendant could not be found within the State of Oregon.

The several assignments of error all go to these questions and counsel will, with leave of Court, discuss these questions rather than the assignments.

The Federal Court will not in this proceeding search the record of the Oregon State Court for defects and informalities or errors apparent upon and judged by the face of the record.

The Honorable Trial Court took the view that because this action was a suit to quiet title, he would search the Oregon record for defects. He says, (Record Page 48):

“It may be conceded that a Federal Court has not jurisdiction at the suit of a party to vacate or annul a judgment or decree of a State Court for error or irregularity appearing on the face of the record. (Citing Nat’l Surety Co. vs. State Bank, 120 Fed. 593). But it has jurisdiction to entertain a bill to quiet title to real property or to remove a cloud therefrom where the requisite diversity of citizenship exists.

This has been, from time immemorial, one of the well known functions of a court of equity where the remedy at law was inadequate and in such a suit the court may enquire into the jurisdiction of a State Court to render a judgment or decree which is relied upon and brought before the court by a party claiming the benefit thereof."

It is apparent, therefore, that the trial court took the view that an action to quiet title stood in a different relation than other suits. In this we submit that the trial court was in error. This identical question was before the Circuit Court of Appeals for the Eighth Circuit, in the case of Little Rock Junction Railway vs. Burke, 66 Fed. Page 83. This was an action to quiet title, brought by John Burke, the appellee, against the Railway Company. The bill averred, in substance, that the Railway Company was in possession of the property under a sale under a judgment, which was claimed to be void, and was, in fact, void, as shown on the face of the record, for the reason that the Arkansas Court never acquired jurisdiction over the appellee. The case seems to be on all fours with the one at bar. In that case, the Eighth Circuit, by Judge Thayer, says:

"It is manifest from an examination of the record in the case at bar that the Circuit Court found and decided that the decree of the Pulaski Chancery Court condemning the land in controversy to be sold for the non-payment of taxes

was utterly void for want of jurisdiction; and that issue as to the validity of the decree of the Chancery court appears to have been tried and determined by the Circuit Court solely upon an inspection of the record in the tax suit. No evidence seems to have been offered for the purpose of impeaching the decree in question, except the record in the suit to foreclose the tax lien."

The facts are similiar here,

Continuing:

"We think, therefore, that it may be accepted as a general rule, in the absence of any statutory provisions on the subject, that the proper forum in which to seek relief, otherwise than by an appeal or writ of error, against a judgment or decree which is alleged to be void on the face of the record, is in the Court by which such judgment or decree was rendered, and that other Courts of co-ordinate jurisdiction have no authority to grant relief in such cases. But, whatever may be the correct rule in this respect as between State Courts of equal authority, it is manifestly true, we think, that, owing to the peculiar relations which exist between State and Federal Courts of co-ordinate jurisdiction, the Federal Circuit Court ought not to review, modify, or annul a judgment or decree of a State Court, unless such review is sought on a

state of facts not disclosed by the record of the State Court, which, for that reason, has not undergone judicial examination. The sufficiency of the service, whether by publication, or otherwise, to support a final adjudication, and every other matter apparent upon the face of the record, are supposed to have received due consideration by the Court rendering a judgment or decree before the same was entered. Therefore, when a suit is instituted to nullify a decree for matters disclosed by the record, and for no other reason, the proceeding is not a new suit, but is essentially in the nature either of an appeal from the original adjudication or a bill of review. The Federal Courts should remit proceedings such as these to the judicial tribunal of the State which made the record that is to be reviewed or impeached."

Continuing:

"Forasmuch, then, as the injury complained of was subject to redress in the modes above indicated, we are constrained to hold that the Federal Court ought not to have intervened, as it did, notwithstanding the fact that the decree complained of had already been executed. The Federal Circuit Courts sitting in equity have an undoubted right, in certain cases, to entertain a bill to quiet title or to remove a cloud upon a title, for this has been from time immemorial one of the well-known functions of a court of equity."

Continuing:

“But we think that this jurisdiction does not extend, and ought not to be extended, to cases where the cloud upon the title consists of a judgment or decree of a State Court, and proceedings that have been taken in execution of the same, which are alleged to be utterly void, and on that account require the introduction of no evidence to establish their invalidity other than the record of the State Court. Because the Federal Courts have power to entertain a bill to quiet title, it does not follow that, under the guise of administering such relief, they will review the proceedings of a State Court, and vacate the judgment of a State Court which is obviously void when tested by the record, or that they will undo what may have been done by virtue of proceedings taken under such a judgment, so long as it is possible for the complainants to have such judgment and the proceedings taken thereunder vacated by a proper application addressed to the State Court. For these reasons, our conclusion is that the facts proven at the trial were not of such a character as are essential to support an original bill in the Federal Courts.”

This case has been referred to in a number of cases.

United States vs. Andersen,
169 Federal, 201.

Union Pacific Railway Co. vs.
Flynn, 180 Federal, 565.

This case has also received special consideration at the hands of this Court, speaking by Judge Morrow, in the case of Blythe vs. Hinckley, 84 Federal, 247. This case involved the question as to whether or not, in a suit in equity, where it was claimed that a probate proceeding in the courts of California was void, the Federal Courts would entertain a suit to quiet title where the sole question was a review of the California Courts for defects in its proceeding. In that case, the whole question as to the jurisdiction of Federal Courts was discussed at length by this Court, and this Court said:

“These cases clearly establish the doctrine that the courts of the United States will not take jurisdiction of a case to correct an error appearing on the face of the record in a judgment rendered in a State Court, nor will they take jurisdiction of a case the object of which is to set aside a judgment of a State Court void upon its face. Now, if we examine the present bill, we find that the latter object is its substantial scope and purpose; and, to accomplish this object, there is set forth, with great particularity, the record and proceedings in the Superior and Supreme Courts of the State in a controversy between the same parties, concerning the same subject-matter.”

Blyth vs. Hinckley, 84 Federal, 255.

And so in this case. The plaintiff's testimony consists of five exhibits, and three pages of oral testimony. Exhibit 1, is the complete record of the Oregon Court, and is found on pages 66-125 of this record. Exhibit 2, (record 125). Exhibit 3, (record 130), and exhibit 4, (record 134), are plaintiff's muniments of title. Exhibit 5 is the check given in consideration for and the testimony of plaintiff relates exclusively to the time, place, and manner of acquiring these lands.

There is no showing nor claim of any mistake, fraud or unavoidable accident preventing the appearance on the part of the plaintiff here or its predecessor in interest in the Oregon Court. We find therefore the substantial scope and purpose of this proceeding, is to correct an error appearing on the face of the record, in a judgment in a State Court.

Mr. Street in his work on Equity Practice, referring to the question here, says:

‘But as a matter of comity and policy, the Federal Courts will sometimes refuse to give relief in a cause where the plaintiff's rights can be amply protected by the remedy provided in the State Courts. Furthermore, the Federal Court is always careful not to permit its independent equitable jurisdiction to be perverted into an instrument for obtaining relief that ought properly to be obtainable on appeal in the State Court.’

(Street, Federal Equity Practice, Sec. 25).

The attachment of real property and its subsequent sale under a judgment of the State Court will give the State Court jurisdiction which will not be attacked in a collateral proceeding in the Federal Court.

A case which seems to us to be decisive of this matter, is the case of *Cooper vs. Reynolds*, 10 Wallace 308-321, 19 Law. Ed. 931.

This was a case very similar to the case at bar. Ejectment was brought by the defendant in error on the ground that the title of the defendant Cooper, was void, by reason of the fact that certain judicial proceedings of the State Courts of Tennessee on which it was based, were void for want of jurisdiction. In that case as in this, the record of the proceedings in the State Court was introduced in evidence. The Court instructed the jury that they were null and void for want of jurisdiction. There, as in this case, a writ of attachment was issued; no process was ever served on Reynolds. The objections taken to the proceeding on attachment, were,

First: That by the law of Tennessee, the attachment could not be issued at the beginning of the suit where action was *ex delicto*, but could only be issued after suit commenced.

Second: That the affidavit was defective.

Third: That there was no publication of notice as required by the statutes.

It was plain in that case, that the State Court of Tennessee had no jurisdiction of the person of the defendant. It was also plain that the writ of attachment was void. The property was, however, seized by the Court and sold under final judgment. The property here was seized by the Court, and sold under final judgment. The Court in each case had jurisdiction of the subject matter and the property. It was there urged, as it is here, that the right to adjudicate was not acquired by reason of the attachment, and such had been the holding of the Tennessee Courts. The Courts of Tennessee had previously held to this effect, but in the *Cooper vs. Reynolds* case, the Supreme Court of the United States, held that so far as a review by the Federal Courts was concerned, the seizure of the property was the one essential of jurisdiction. The State Court was a Court of general jurisdiction; it had jurisdiction of the subject matter; it had jurisdiction of the property by seizure. In that case, the Supreme Court of the United States said:

“Now in this class of cases, on what does the jurisdiction of the Court depend? It seems to us that the seizure of the property, or that which in this case, is the same in effect, the levy of the writ of attachment on it, is the one essential requisite to jurisdiction, as it, unquestion-

ably, is in proceedings purely in rem. Without this the Court can proceed no further; with it the Court can proceed to subject that property to the demand of plaintiff. If the writ of attachment is the lawful writ of the Court, issued in proper form under the seal of the Court, and if it is by the proper officer levied upon property liable to the attachment, when such a writ is returned into Court, the power of the Court over the res is established. The affidavit is the preliminary to issuing the writ. It may be a defective affidavit, or possibly the officer whose duty it is to issue the writ may have failed in some manner to observe all the requisite formalities; but the writ being issued and levied, the affidavit has served its purpose and, though a revisory Court might see in some such departure from the strict direction of the statute sufficient error to reverse the judgment, we are unable to see how that can deprive the Court of the jurisdiction acquired by the writ levied upon defendant's property.

“So, also, of the publication of notice. It is the duty of the Court to order such publication, and to see that it has been properly made and, undoubtedly, if there has been no such publication, a Court of Errors might reverse the judgment. But when the writ has been issued, the property seized, and that property been condemned and sold, we cannot hold that the Court

had no jurisdiction for want of a sufficient publication of notice.”

Cooper vs. Reynolds

10 Wall. 308

19 Law. Ed. 931.

Again with reference to defects and irregularities where the property has been seized by attachment, the case of Cooper vs. Reynolds was approved in the case of Mathews vs. Densmore, (109 U. S. 216) in which the Supreme Court said:

“The precise point as to the validity of this writ of attachment was under consideration in this Court in the case of Cooper vs. Reynolds, 10 Wall., 308 (77 U. S. XIX., 931), in which the effect of an insufficient affidavit for a writ of attachment was set up to defeat the title to land acquired by a sale under the attachment. The case has been quoted often since, and is conclusive in the Federal Courts in regard to the validity of their own processes when collaterally assailed as in the present case.

“The Court, after discussing the nature of the jurisdiction in cases of attachment, their relation to suits in rem and in personam, in answer to the questions, on what does the jurisdiction of the court in that class of cases depend? answers it thus, “It seems to us that the seizures of the property, or that which in this case

is the same in effect, the levy of the writ of attachment on it, is the one essential requisite to jurisdiction, as it unquestionably is in a proceeding purely in rem. Without this, the Court can proceed no further; with it, the Court can proceed to subject that property to the demand of plaintiff. If the writ of attachment is the lawful writ of the Court, issued in proper form under the seal of the Court, and if it is by the proper officer levied upon property liable to the attachment, when such writ is returned into the Court the power of the Court over the res is established. The affidavit is preliminary to issuing the writ. It may be a defective affidavit, or possibly the officer whose duty it is to issue the writ may have failed in some manner to observe all the requisite formalities; but the writ being issued and levied, the affidavit has served its purpose, and though a revising Court might see in it some such departure from the strict direction of the statute sufficient error to reverse the judgment, we are unable to see how that can deprive the Court of the jurisdiction acquired by the writ levied upon the defendant's property."

See *Voorhees vs. Bank*, 10 Pet., 449; *Grignon vs. Astor*, 2 How., 319."

(27 Law. Ed. Page 913).

This case is cited with approval in the case of *Erstein vs. Rothschild*, (22 Fed. Page 63), (By Mr. Justice Matthews) in which the Court said:

“It is, then, the doctrine enforced by the Courts of Michigan that a writ of attachment is void unless supported by an affidavit conforming in all material respects to the strict requirements of the Statute, from which the conclusion is deduced that the affidavit itself, being the foundation of jurisdiction, cannot be the subject of amendment. But this is not the doctrine of the Courts of the United States in the case of *Matthews vs. Densomer*, 109 U. S. 216, S. C. 3. Sup. Ct. Rep. 126. The Supreme Court of the United States reversed the Supreme Court of Michigan on this very point, and held that the jurisdiction of the Court over the property taken by virtue of the writ of attachment did not at all depend upon the regularity or sufficiency of the affidavit; all questions of that character being questions merely of error in procedure. And the principle was then considered to have been fully established in *Cooper vs. Reynolds*, 10 Wall. 308; and that such is the general rule, embracing the power of amendment, appears also from *Tilton vs. Cofield*, 93 U. S. 163.”

This case was under consideration in *Booth vs. Denike*, 65 Fed. Page 46, which quotes the *Erstein* case with approval and permits the amendment of affidavit of garnishment, though such amendment was not authorized by the laws of Texas, under which the case arose, and where it had been held

that such a garnishment was void under the State laws.

This case is also cited with approval in the case of *Biglow vs. Chatterton*, Circuit Court of Appeals, Eighth Circuit, 51 Fed. Page 620. This was a case in equity to quiet title, as this one is here. In that case the Circuit Court of Appeals for the Eighth Circuit said:

“The fact is established by this amended proof of publication that the Court had jurisdiction in the attachment suit. That being so, its judgment is not open to collateral attack, however erroneous it may be. It is unnecessary, therefore, to inquire whether there are any mere irregularities or errors in the proceedings for which a Court exercising appellate jurisdiction would reverse the judgment. It is the settled doctrine of the Supreme Court of the United States that an attachment suit against an absconding or non-resident debtor, who does not appear to the action,—which is the case disclosed is a proceeding in rem, in which the levy of the attachment on the property is the one essential requisite to the exercise of jurisdiction; and that when the writ has been issued, the property seized, condemned, and sold, the jurisdiction of the Court over the property is not affected by the fact that there was an insufficient or no publication of notice to the defendant. (*Cooper vs.*

Reynolds, 10 Wall. 308). In that case, Mr. Justice Miller, who delivered the opinion of the Court, says to hold any other doctrine would be "to overturn the uniform course of decision in this Court, to unsettle titles to vast amounts of property long held in reliance on these decisions, and in our judgment would be to sacrifice sound principle to barren technicalities. *****" It is believed the doctrine of the Supreme Court of the United States on this question is generally approved by the State Courts. In *Freeman vs. Thompson*, 53 Mo. 183, 198, Judge Sherwood, after discussing the question and citing authorities to support the view maintained in *Cooper vs. Reynolds*, supra, says: "And I very much doubt whether a single well-considered case can be found in opposition thereto." (*Kane vs. McCown*, 55 Mo. 181; *Johnson vs. Gage*, 57 Mo. 160; *Paine vs. Moorland*, 15 Ohio, 435). It is not necessary to the decision of this case to determine what the doctrine of the Supreme Court of Minnesota is on this subject. In the case of *Kenney vs. Goergen*, 36 Minn. 190, 31 N. W. Rep. 210, Judge Mitchell, who delivered the opinion of the Court, said,

"The proceedings (by attachment against a non-resident debtor,) although in form in personam are in effect in rem, and it is only by attaching the property that the court acquires jurisdiction, and then only to the extent of the property attached."

In support of this proposition, the learned Judge cites among other authorities, with apparent approval, *Cooper vs. Reynolds*, *supra*; but it is not clear that the Court meant to adopt the doctrine of that case in all its breadth. In the attachment suit we are considering, the property was seized on the writ of attachment, and there was due publication of the summons to the defendant also, so that the Court had jurisdiction over the attached property under either rule.

In the case of the *Southern Bank & Trust Company vs. Folsom*, 75 Federal, Page 931, the Circuit Court of Appeals for the Sixth Circuit, Judge Lurton said:

The effect of the levy of the attachment issuing from the State Chancery Court, and the return of the writ into Court, under the Tennessee Statutes and decisions, was to place the attached land within the control and possession of the State Court. It was an actual seizure of the res, and thereby passed into the exclusive possession of the Court, as fully as if a receiver had been appointed.

(*Cooper vs. Reynolds*, 10 Wall. 308, 317).

However, defective the proceeding under which the attachment issued, it would not follow that the State Court was without jurisdiction.

The object of the bill was to subject the land attached as the property of the Magnatite Iron Company to the satisfaction of its debts. For This purpose the land itself was seized, and thus drawn within the jurisdiction of the Court by this assertion of control and power over it. The validity of that act of power and authority could not be questioned by another Court so long as the State Court retained the possession thus acquired.

This same proposition has been before this Court and decided adversely to the position taken by the trial Court in the case of Heid vs. Ebner. That was a suit to quiet title as this one is. It seems therefore, to dispose of the trial Court's contention that a suit to quiet title was not within the rule, that the Federal Courts would not examine into defects and informalities. It will be recalled that the trial Court says in his decision, that this general rule may be conceded, but that a suit to quiet title is an exception. In the Reed case, this Court speaking by Judge Morrow, said:

“It is the general rule in the United States that the confirmation of a judicial sale by a Court of competent jurisdiction cures all irregularities in the proceedings leading up to or in the conduct of the sale, and that while such a sale will be set aside where fraud, mistake or surprise is shown, mere irregularities in the prelim-

inary proceedings do not render the sale invalid, and will not suffice to set aside after confirmation. *Wills vs. Chandler* (C. C.) 2 Fed. 273; *Cooper vs. Reynolds*, 10 Wall. 308. 19 L. Ed. 931; *Ludlow vs. Ramsey*, 11 Wall. 581, 20 L. Ed., 216; *Stockmeyer vs. Tobin*, 139 U. S. 176, 11 Sup. Ct. 504, 35 L. Ed. 123.

(133 Federal, Page 158).

In the case of *Thompson vs. Tolmie*, 2 Peters Page 157, 7th Law Ed. Page 381, lays down the law to be, that when the jurisdiction of the Court (under whose authority the order of sale was made) appears on the face of the proceedings, its errors and mistakes, if any were committed, cannot be corrected or examined when brought up collaterally. This case has never been overruled or modified.

In *Holmes vs. Oregon & California Ry. Co.*, 9th Federal, Page 245, Judge Sawyer said:

“The seizure within the County was the jurisdictional fact, and this was an act to be performed by the Court, or, on its behalf, through the agencies appointed by law. The jurisdictional fact was an act to be performed to get jurisdiction of the thing, in all respects analogous to the service of summons within the State in order to acquire jurisdiction of the person, or levy of an attachment upon the property in an attachment suit in order to get jurisdiction of the property.”

In the *National Nickel Co., vs. Nevada Nickel Syndicate*, 112 Federal, Page 44, in the Circuit Court for the Ninth Circuit, sustaining a judgment upon insufficient publication said:

“The general and well-settled rule of law in such case is that when the proceedings are collaterally drawn in question, and it appears upon the face of them that the subject matter was within the jurisdiction of the court, they are voidable only.

The errors and irregularities, if any exist, are to be corrected by some direct proceeding, either before the same court to set aside such faulty proceedings, or in an appellate court. *Thompson vs. Tolmie*, 2 Pet. 157, 163, 7 L. Ed. 381; *Voorhees vs. Bank*, 10 Pet. 469, 9 L. Ed. 490; *Cooper vs. Reynolds*, 10 Wall. 308, 319, 19 L. Ed., 931, *Burley vs. Flint*, 105 U. S., 247, 26 L. Ed. 986.

It will be recalled that there was other evidence to support the findings of the Court, than the affidavit which was called in question. The Supreme Court of Oregon had theretofore held that where an affidavit was presented that contained some proof of non-residence, that was sufficient to give the judge jurisdiction. Speaking through Mr. Justice Bean then on the Supreme bench of Oregon, in the case of *George vs. Nowlan* 38th Oregon, 537, 64 Pac. 1, it says:

“The statute requires that certain facts shall be made to appear by affidavit, to the satisfaction of the Court or judge thereof (Hill’s Ann. Laws Or. 56), before an order of publication is made; and where the affidavit tends to prove such facts, and the Court or judge adjudges it sufficient, such adjudication is conclusive in a collateral proceeding. 17 Enc. Pl. & Prac. 78; *Pennoyer vs. Neff*, 95 U. S. 714, 24 L. Ed. 565. The defects in the affidavit referred to could have been taken advantage of by an appeal or some other direct proceeding, but do not furnish ground for an injunction restraining the enforcement of the decree.

The case of *Graff vs. Lewis*, 71 Federal, 591 is a case very much like the case at the bar. The decision is by Judge Shiras.

In this case, “H and others brought an action in a Nebraska court of competent jurisdiction against G and others, non-residents of that state, and filed in the clerk’s office an affidavit for the purpose of securing an attachment against the defendant’s property in accordance with the procedure in that state. The clerk accordingly issued the attachment which was levied upon the land, the record title to which stood in G’s name. Afterwards, by due proceedings, judgment was entered in the action, the defendants being served by publication, and

not answering and the attached property was sold under the order of the Court, and bought by one L. Subsequently one E. to whom G had conveyed the land before the commencement of the attachment suit, but whose deed was not recorded till after the sale to L., brought suit against L to assert his title to the land, alleging that the affidavit upon which the attachment against G & Co., was granted did not comply with the requirements of the Nebraska statutes. **Held**, that the validity of the judgment of the Nebraska Court could not be collaterally attached on such grounds."

This doctrine is approved in the late case of the Union Pacific Ry. Co., vs. Flynn, 180 Federal, 565, in which the Court says:

"It appearing then that it is sought by this action in effect, to review proceedings in a state court of competent jurisdiction for the revision of alleged errors and irregularities therein, apparent upon the face of the record, and that complainant is not without an adequate remedy in the jurisdiction in which such irregularities arose, and are properly reviewable, it follows that this Court cannot take jurisdiction of the matter."

This case is complete, throughout, well considered and decided July 16, 1910.

The Honorable Trial Court sought to distinguish

the case at bar from the case of Cooper vs. Reynolds. He says, at page 50 of the Record:

“An action against a non-resident is ineffectual unless some property of the defendant is brought within the control of the Court and subject to its disposition by writ of attachment, but the right in Oregon to adjudicate thereon is acquired not by the attachment and publication thereof, as was the case of Cooper vs. Reynolds (10 Wall. 308) but by the service of summons upon the defendant either in person or by publication.”

We submit that the Honorable Trial Court is in error in respect to this matter, for, as we have before stated, the rule was in Tennessee that an invalid attachment would not give jurisdiction, and the courts of Tennessee had held that upon direct attack, such want of jurisdiction would be found. This matter was carefully presented to the Supreme Court of the United States, in the case of Cooper vs. Reynolds and was carefully considered by the Supreme Court of the United States, and was there held adversely to the statement of the Trial Court.

The Honorable Trial Court was also in error, we submit, in his statement with reference to the law of Oregon. The Supreme Court of that State has said, in the case of Bank of Colfax vs. Richardson,

34 Ore. 518, 75 Am. State Reports 664, 54 Pac. 359, speaking by Judge Bean:

“When, therefore, the Court has the de facto custody of the property by virtue of a de facto writ of attachment, and a right to determine whether such property shall be subject to the payment of plaintiff’s demand by virtue of constructive service of process, it has full and complete jurisdiction in the premises, and subsequent errors or irregularities in the proceedings will not be available on collateral attack.”

In which the case of *Cooper vs. Reynolds* is discussed at length. Judge Bean says, after having quoted at length from that case,:

“This case has been often quoted and approved by the Supreme Court, and is said in *Mathews vs. Densmore*, 109 U. S. 216, 219, to be conclusive in regard to the validity of such proceedings when collaterally assailed.”

The *Bank of Colfax* case was a collateral attack in the Courts of Oregon upon a judgment entered by the Court of Oregon, and therefore stands in a different relation from a collateral attack upon the State Court in the Courts of the United States, as we have tried to point out. In that case, there was no proof of service of summons. The original summons did not appear in the judgment roll, and other defects are noted. Yet, the judgment entered in this regard was held to be proof against collateral attack.

It seems to us, therefore, that the Honorable Trial Court failed to make the distinction which the Supreme Court of the United States had made in these cases, and this seems to us to be the gist of this appeal. The Supreme Court of the United States says that the fact of attachment gives the Court such jurisdiction in the case that it will not be attacked in the Federal Courts in a collateral proceeding. In other words, it is the fact of attachment that gives the Court such jurisdiction as will protect it from collateral attack. It may be true that this fact of attachment would not protect from collateral attack in the Courts of Oregon but it seems plain that the Federal Courts have held that it would protect from collateral attack by the Federal Courts. The Supreme Court in the case of *Cooper vs. Reynolds* says so in so many words. This case has never been reversed or modified, but has been approved in many cases in the Federal Courts.

Cole vs. Cunningham, 133 U. S.
116, 33 L. Ed. 543.

It cannot be questioned that by the levy of the writ of attachment, and the institution of the proceedings in equity to settle the title to the attached property, the jurisdiction of the State Court over the realty became of the nature of jurisdiction in rem.

Gates vs. Bucki, 53 Fed. 967.
Pennoyer vs. Neff, 95 U. S. 714.

The question of the jurisdiction of the Oregon Court is not to be determined by the laws of Oregon and the decision of its Courts, but is a question to be determined by the United States Courts and tested by the law as administered by them.

Rogers vs. Alabama, 192 U. S. 226, 231, 48 L. ed. 417, 419, 24 Sup. Ct. Rep. 257;

German Sav. & L. Soc. vs. Dormitzer, 192 U. S. 125, 48 L. ed. 373, 24 Sup. Ct. Rep. 221.

Huntington vs. Attrill, 146 U. S. 657, 36 L. ed. 1123, 13 Sup. Ct. Rep.

Pennoyer vs. Neff. 95 U. S. 714, 24 L. Ed. 565.

Any other rule would preclude the United States Court from exercising jurisdiction where it was denied by the State Court or refusing jurisdiction where it was granted by the State Court.

Where the Court makes a solemn finding, that it appears to its satisfaction that the defendant cannot be found within the State, and makes an order of publication of summons, such finding is proof against collateral attack.

There is another and sufficient reason why the Trial Court should not have taken jurisdiction in this proceeding, as has been pointed out. The defect relied upon was the insufficiency of an affidavit for publication. It will be recalled that Judge Hamilton of the Circuit Court of Oregon made an order directing the publication of this summons, in which he recited:

“It appearing TO THE SATISFACTION OF THE COURT that neither of the defendants above named can be found within the State of Oregon”.

It will be also observed that publication of notice was actually given as fully as it would have given, had the affidavit referred to been sworn to before an Oregon notary public. This identical question was before the Supreme Court of the United States on this identical statute under identically the same circumstances in the case of *Pennoyer vs. Neff*, 5 Otto, 714-748, 24 Law Ed. 565. This was an action to recover the possession of a tract of land situated in Oregon. The plaintiff claimed under a patent, the defendant claimed under a judicial sale. It was contended that the judgment was invalid from defects in the affidavit upon which the order of publication was obtained and in the affidavit by which the publication was proved. The Court, in that case, speaking by Mr. Justice Field, said:

“The Court below did not consider that an attachment of the property was essential to its jurisdiction or to the validity of the sale, but held that the judgment was invalid from defects in the affidavit upon which the order of publication was obtained, and in the affidavit by which the publication was proved.

“There is some difference of opinion among the members of this Court as to the rulings upon

these alleged defects. The majority are of opinion that, inasmuch as the statute requires, for an order of publication, that certain facts shall appear by affidavit to the satisfaction of the Court or judge, defects in such affidavit can only be taken advantage of on appeal, or by some other direct proceeding, and cannot be urged to impeach the judgment collaterally."

It will be observed that this opinion was written some years after that of *Galpin vs. Page*, *Supra*, relied upon by the Trial Court. It will be also observed that the case of *Galpin vs. Page* was cited by counsel and cited by Court in this case. It may be claimed that the expressions used here are obiter, but it cannot be successfully so claimed. The rule which the Supreme Court made was necessary to the decision of the case.

We cannot understand how the Honorable Trial Court can distinguish that case from the one at bar. The facts with reference to the affidavit are identical, and the words in the order made by Judge Hamilton are the exact words used by and referred to by the Supreme Court of the United States. It seems to us that there is no escape from this ruling. It may be claimed that that was an action for the possession of land, while the case at bar is a suit to quiet title, but we submit that there is no distinction. Under the Oregon law, title may be tried either in an action to recover possession or in a suit to quiet title.

Since the decisions in the cases of *Pennoyer vs. Neff* and *Galpin vs. Page*, both of these cases were considered in the case of *Applegate vs. Lexington & Carter County Mining Co.*, 117 U. S. 255, 29 Law Ed. 892. This was a suit in the nature of an action of ejectment to recover possession of land in Kentucky. In that case, the plaintiffs presented a certified copy from the Mason County Circuit Court of a case formerly pending therein, as one of their muniments of title. This was rejected for sundry defects in the publication of notices. In that case the Court said:

“The result of the authorities and what we decide is, that where a Court of general jurisdiction is authorized in a proceeding, either statutory or at law or in equity, to bring in, by publication or other substituted service, non-resident defendants interested in or having a lien upon property lying within its territorial jurisdiction, but is not required to place the proof of service upon the record, and **THE COURT**

ORDERS SUCH SUBSTITUTED SERVICE,

it will be presumed in favor of the jurisdiction that service was made as ordered, although no evidence thereof appears of record, and the judgment of the court, so far as it affects such property, will be valid. The case of *Galpin vs. Page*, 18 Wall. 350 (85 U. S. bk. 21, L. ed. 959), cited by counsel for defendant, is not in conflict with this proposition. The judgment set up

on one side and attacked on the other in that case was rendered on service by publication. The law permitted service to be made by publication only where certain facts were made to appear to the satisfaction of the Court, and the Court by a precedent order, which must necessarily appear of record, authorized service to be made by publication. But the record showed no such order, and the publication, therefore, was the unauthorized act of the party, and appeared affirmatively to be invalid and ineffectual. See also *Pennoyer vs. Neff*, 95 U. S. 727, 734 (Bk. 24, L. ed. 570, 572)'".

There was sufficient showing in this case to justify the Oregon Court in its finding, that it appeared to the satisfaction of the Court that the defendant could not be found within the State of Oregon.

The doctrine that defects in an affidavit for an order for service of summons by publication cannot be urged to impeach the judgment collaterally, has been reaffirmed in the following cases in the United States Court:

Holmes vs. Ore. & Cal. Ry. Co.

9 Fed. 245.

Beattie vs. Wilkinson

36 Fed. 650.

and many other cases, and in the Courts of Oregon, in the cases of

George vs. Nowlan, 34 Ore. 543,
64 Pac. 1.

McFarlane vs. Cornelius, 43 Ore.
519, 73 Pac. 325.

The Oregon provision with relation to affidavits for publication of summons came under the attention of the Supreme Court of the United States in the recent case of Marx vs. Ebner, (1901,) 180 U. S. 314-320, 45 Law Ed. 547, from the District Court of Alaska. This identical Oregon statute was then under consideration. In that case the Supreme Court said:

“We think where the affidavit shows that the defendant is a non-resident of the district and that personal service cannot be made upon him, and the marshal, or other public officer to whom the summons was delivered, returns it with his indorsement that after due and diligent search he cannot find the defendant, such proof is sufficient to **give jurisdiction to the Court or judge to decide the question.** It is not to be expected that positive proof that the defendant cannot be found within the state or district will always be attainable. Facts must appear from which it will be a just and reasonable inference that the defendant could not after due diligence be found, and that due diligence has been exercised, and we think such an inference is reasonable when proof is made that the defendant is a non-resident of the state, and there is an affidavit that

personal service cannot be made upon him within its borders and there is a certificate of the marshal such as appears in this case. There is, too, some presumption that the public officer who has received the process for service has done his duty and has made the reasonable and diligent search for the defendant that is required. Such presumption is not alone sufficient in the absence of all proof of other facts, but when such other facts as appear in this case are sworn to, it may add some weight to them as a presumption in favor of the performance of official duty.

“Within this rule the proof in this case was enough to give jurisdiction to the judge who granted the order to decide the question.”

In this case there is a return of the sheriff “not found”. There is the affidavit of O. P. Coshow that the last known post office address of the defendants was at Hoquiam, Washington, and Seattle, Washington, respectively. This affidavit was not questioned. There was the defective affidavit. There was the affidavit (Record page 92) of Coshow that the address of the defendants is unknown, and upon this evidence, and we know not what other evidence, Judge Hamilton of the Oregon Court made his finding that the defendants could not be found within the State of Oregon. Such finding, it seems to us, is conclusive. This whole question has been discuss-

ed at length in the case of Cohen vs. Portland Lodge No. 142, B. P. O. E., 144 Fed. 274. In this case, however, the point does not seem to have been raised that the Court would not search the Oregon record. It is nowhere referred to in the opinion. In that case the affidavit for publication was found to be sufficient. This case was appealed to this Court and it is found, in 152 Federal 357, where the whole question of the insufficiency of an affidavit for publication was discussed. The point does not seem to have been raised in this Court in this case that the Federal Courts would not set aside a judgment of a State Court for defects appearing solely on the face of the record. It is not discussed in the later case of Ranch vs. Werley, 152 Fed. 509. This Court, speaking by Judge Wolverton, discussed the subject of the sufficiency of affidavits of publication. In that case this Court said:

“It is deemed sufficient, under the authorities, that facts be stated from which it shall appear, to the satisfaction of the Court or judge making the order, that personal service cannot be had upon the defendant within the State.”

So far as we are able to ascertain, the question was not raised in that case as to whether or not this Court would overturn the record of the Oregon Court for defects based upon the insufficiency of the record, and judged solely by an examination of the record. In the Worley case, one of the elements charged was

that there had been fraud in obtaining the judgment. This was not sustained. It will be observed that in each of the cases, the affidavit for publication was found to be sufficient. The later case of Bower vs. Stein, 165 Fed. 232, 177 Fed. 673, also discussed the sufficiency of affidavits for publication, and the publication in each instance sustained. In these cases the point that the Court would not search the Oregon record does not seem to have been raised.

Our view of this matter is this; that in an attachment case, the Court gets jurisdiction of the res ^{caused} ~~on~~ subject matter.

That upon an application for an order for publication, it becomes the duty of the Court to examine the record and make an order for publication. That this is a judicial function. That if the Court has any evidence before it, an erroneous finding on such evidence constitutes error of law, and not total want of jurisdiction. That the finding of the Oregon Court that it appears to the satisfaction of the Court that the defendant could not be found within the State of Oregon, at most constituted error.

That even if this were based solely upon an affidavit made by a Washington Notary Public, it would constitute error, and not lack of jurisdiction. That the United States Court will not set aside this judgment for error in the exercise of a judicial function. That therefore, the Honorable Trial Court erred in finding the Oregon judgment a mere nullity, and

that in fact, such Oregon judgment is proof against collateral attack.

As we have heretofore said, we understand that it is conceded, if the affidavit which was attacked is sufficient, then the title to this property is in appellant. But lest there be some misunderstanding in that regard, we will briefly state the facts which show appellant's title.

The property in question was attached under the writ from the Oregon Court on the 1st day of April, 1907. The property had been acquired by Aaron Johnson under the timber act previously thereto for such purpose. It had been deeded from Aaron Johnson to Andrew Johnson, his brother, on May 24, 1904, under a consideration expressed as One Dollar (\$1). On February 27, 1907, Aaron Johnson made a deed to the North Star Lumber Co. On April 8, 1907, Andrew Johnson deeded back to his brother Aaron. Both deeds were delivered to the North Star Lumber Co. on April 12, 1907, twelve days after the attachment; and both deeds were recorded on April 24th, 1907, twenty-four days after the attachment. Our position is,

First: That as shown by the record, the property was, at the time of the attachment, the property of Aaron Johnson, the defendant in the Oregon Court, or

Second: If this is not the case, the attachment

seized upon the afterward acquired title, acquired by the deed of April 8, 1907, and took precedence over any subsequent transfers and subsequently recorded deeds, inasmuch as the law of Oregon provides that an attaching creditor is a bona fide purchaser and would take the afterward acquired title.

Discussing the proposition which comes up in this cause on account of the attachment of the real property in controversy, it is safe to say that if Aaron Johnson was the owner of the land in controversy on April 1, 1907, at the time the action was brought by John W. Johnson vs. Aaron Johnson et al, in the Circuit Court of the State of Oregon for Douglas County, that the attachment of said property was regular. The plaintiff will not deny this.

That Aaron Johnson was the owner of the property attached appears from plaintiff's Exhibit 4, which is the deed from Aaron Johnson to the North Star Lumber Company. Aaron Johnson, as grantor, says in that deed that he is the owner and has a right to sell the property, and he agrees to warrant and defend the title thereto. According to said exhibit, the consideration received for that deed was \$2,000.00. It is not strange that the only evidence of consideration (other than a nominal) in any of the deeds conveying this property is in the one from Aaron Johnson to plaintiff. The deed from Aaron Johnson to Andrew Johnson, dated May 21, 1904, expresses a consideration of \$1.00. (Plaintiff's Exhibit No. 2.) The deed from Andrew Johnson to

Aaron Johnson, dated April 8, 1907, expresses a consideration of \$1.00. (Plaintiff's Exhibit No. 3.) But the deed from Aaron Johnson to plaintiff expresses a consideration of \$2,000.00. This deed was delivered about April 12, 1907. According to the testimony of Mr. Williams, Aaron Johnson evidently had an interest in the property in controversy, which plaintiff estimated to be worth at least \$2,000.00, on April 12, 1907.

If Aaron Johnson owned the property in dispute on February 21st, at the time the deed to plaintiff was signed, or on March 8, 1907, at the time this deed was acknowledged, he also was the owner on April 1, 1907, at the time this property was attached. Evidently the deed from Andrew Johnson to Aaron Johnson, dated March 8, 1907, (Plaintiff's Exhibit No. 3,) was for no other purpose than to complete the chain of title.

An attaching creditor "is deemed a purchaser in good faith for a valuable consideration of the property *** attached ***" Sec. 301 L. O. L.

When the sheriff's certificate is filed for record "the lien in favor of plaintiff shall immediately attach to the property described in the certificate." Sec. 303 L. O. L.

An attachment lien perfected in compliance with the foregoing sections gives to an attaching creditor from the time of attachment a valid, subsisting

lien which continues during a period an execution could issue.

Riddell vs. Miller, 19 Or. 368; 23 Pac. 807.

Katz vs. Obenchain, 48 Or. 352-**356**; 85 Pac. 617.

Jennings vs. Lents, 50 Or. 483-**487**; 93 Pac. 327.

In discussing attachment liens, the Supreme Court of Oregon has used the following language:

“The intention of the legislature in adopting these several provisions of the statute was to give the lien creditor under an attachment, judgment or execution, the same standing in regard to his right in or to the property affected thereby which he would gain by a purchase of the property from the debtor, so that in case the debtor had, prior to the levy or of the attachment or execution or the docket of the judgment, executed a deed of conveyance of it, if real property, and the deed were not recorded *** within five days, it would be void as provided in Section 3027 Ann. Code.” (Sec. 7129 L. O. L.) Riddell vs. Miller, 19 Or. 368.

And such has been the holding of that Court through a long line of decisions cited in Jennings vs. Lents, 50 Or. 483-**487** (93 Pac. 327), and in that case the question of right of an attaching creditor in

good faith and bona fide purchaser is discussed, and the following language is used:

“In order, therefore, to determine whether defendant’s title is superior to that of plaintiffs, it is necessary to ascertain only whether, in lieu of the course pursued, he would have been a purchaser in good faith, if with the limited knowledge of the status of Duvall’s title at the time of the levy, defendant had purchased the property from him and paid a valuable consideration therefor. If answered in the affirmative, he has the better title, and must prevail; otherwise plaintiffs have the superior title, and are entitled to the relief demanded. Under the law as it existed prior to the adoption of the statute mentioned, to the effect that after the filing of the attachment proceedings the creditor shall be deemed a purchaser in good faith, the creditor, by virtue of his attachment, acquired a lien only on the actual interest which the debtor had in the property: *Riddle vs. Miller*, 19 Or. 468 (23 Pac. 807). It is obvious that the statute on this point was intended to modify this rule, and to give the attaching creditor, regardless of the actual condition of the debtor’s title, additional protection by placing him in the same position as a bona fide purchaser for value, in case of failure on the part of the real owner to observe the requirements of the recording acts. But, in construing these acts, it

has been repeatedly held, and has become a settled rule in this State, that an attaching creditor, although placed in an equality with a purchaser by this statute, cannot insist on any greater protection than would be granted to such purchaser; and in suits in equity, the claim of a bona fide purchaser for value is an affirmative defense, which must be pleaded, thereby placing the burden of proof in such cases upon the party relying thereon." Citing cases.

So according to the Oregon decisions an attaching creditor is placed on an equality with a bona fide purchaser for value. If an attaching creditor is placed on an equality with a bona fide purchaser, and gives him such rights as he would acquire under voluntary sale of the property by the debtor for a valuable consideration, then it will cut off equities of third persons in the property where the proceeding is taken and perfected without knowledge of such equities. *Jennings vs. Lents, Supra.*

Now, then, if under our law the rights and responsibilities between attaching creditor of real property and debtor are identical, and of the same quality as the rights and responsibilities in a transaction, between vendor and purchaser of the real property for a valuable consideration, then and in that event between such parties and their privies an attachment creditor's lien would fasten

to and after acquired title; that is, the attachment lien of the defendant John W. Johnson would fasten onto any after acquired title Aaron Johnson might have received by the deed from Andrew Johnson to Aaron Johnson, dated April 8, 1907. (Plaintiff's Exhibit No. 3.)

None of those deeds executed in 1907 were valid as against the attachment lien obtained by defendant John W. Johnson in the proceeding in the State Circuit Court for Douglas County, if for no other reason than that none of the deeds were recorded within five days from the date of execution. Sec. 7129 L. O. L.

In operation a bargain and sale deed (and an attaching creditor certainly occupies a position as favorable as a grantee in a bargain and sale deed) conveys an after acquired title.

Taggart vs. Risley, 4 Or. 239.

Langley vs. Kessler, 57 Or. 281-291.

U. S. vs. Cal. Land Co. 148 U. S. 31-47.

So, whatever title Andrew Johnson transferred by his deed to Aaron Johnson, dated April 8, 1907, was subjected to the attachment lien of defendant John W. Johnson in the State Court proceeding. By the supplemental stipulation it is admitted that the order dated October 11, 1907, authorizing the publication of summons was signed in the proper journal, and in that event plaintiff's objection to the publication of summons is not well taken, as there were

three affidavits in the State Court proceeding in Douglas County tending to show the non-residence of Aaron W. Johnson, besides the "not found" return of the sheriff of that county. If the affidavits were not as full and complete as they should have been, those matters were irregularities and should have been corrected in the State Court, and cannot be investigated in this proceeding, as brought up by plaintiff.

Therefore, whether we say Aaron Johnson was the real owner of the property in controversy on April 1, 1907, or whether he again acquired title to said property on April 8, 1907, from Andrew Johnson, the lien of the attaching creditor in the proceeding in the State Court was a valid lien on said property, and as to said lien plaintiff's unrecorded deed is void.

In conclusion, we do not want to be understood as asking affirmative relief. We urge that the Court erred in entertaining jurisdiction in this proceeding, and proceeding of the trial thereof, and erred in not dismissing the action.

We therefore, ask this court to remand the cause with instructions to dismiss the suit, or for such other relief as to the Court may seem equitable.

Respectfully submitted,

MORGAN & BREWER,
JOHN VAN ZANTE,

Solicitors for Appellant.

IN THE
United States Circuit Court of Appeals,
NINTH CIRCUIT.

JOHN W. JOHNSON, <i>et al.</i> ,	}	BRIEF.
<i>vs.</i>		
NORTH STAR LUMBER COMPANY, a Corporation,		
<i>Appellants,</i>		
<i>Respondent.</i>		

Respondent's Statement of the Case.

While we adopt in the main the statement of the case contained in Appellant's brief, we wish to note some exceptions and corrections thereto, and to make a few additions.

This is a suit brought by the North Star Lumber Company against appellant, John W. Johnson, and two others, to quiet title to certain land in Douglas County, Oregon. Appellant alone made defense, the other two defaulting.

The tract in question was patented by the Government to one Aaron Johnson, who, by a deed dated May 21, 1904, recorded June 7, 1904, transferred the land to one Andrew Johnson, in whom the title remained vested until, by a deed dated April 8, 1907, delivered April 12, 1907, and recorded on the 24th day of the same month, he conveyed same to said Aaron Johnson.

The latter then, by a deed dated February 21, 1907, acknowledged March ~~28~~⁸, 1907, and delivered April 12, 1907, conveyed the tract to the plaintiff, the Respondent herein.

Meantime, while plaintiff had its negotiations for the purchase under way and on April 1, 1907, and while the title still stood in Andrew Johnson, the Appellant commenced an attachment suit, in the Circuit Court of the State of Oregon for Douglas County, against said Aaron Johnson and another, and caused the property to be attached in said action on that day as the property of the two defendants therein named. It is not claimed that the second of said defendants ever had any interest in the land. The Respondent earnestly contends, and has brought its suit upon the theory, that, as shown by the admissions of the pleadings and the proofs at the trial, the defendant Aaron Johnson had no title to the property at the date of the attachment; that there never was any valid attachment for this reason; and that, therefore, the whole proceeding was void on this ground, as well as others.

After thus issuing a writ of attachment and causing the same to be levied against the property on the first day of April, 1907, the Appellant, as plaintiff in said action pending in Douglas County, made a pretended affidavit for publication of summons therein. This so-called affidavit appears at pages 84 and 85 of the printed transcript and purports to have been sworn to before a Notary Public for the State of Washington, residing at Hoquiam, on the 7th day of September, 1907. The Respondent contends, as one of the grounds for over-

throwing the judgment upon which Appellant rests his title, that this pretended affidavit is void and is no affidavit at all.

The statute of Oregon then in force respecting affidavits, being Section 819 of Bellinger & Cotton's Annotated Codes and Statutes of Oregon, was as follows:

An affidavit or deposition taken in another state of the United States or a territory thereof, the District of Columbia, or in a foreign country otherwise than upon commission, must be authenticated as follows, before it can be used in this state:

1. It must be certified by a commissioner appointed by the governor of this state to take affidavits and depositions in such other state, territory or district, or country; or,
2. It must be certified by a judge of a court having a clerk and a seal, to have been taken and subscribed before him, at a time and place therein specified, and the existence of the court, the fact that such judge is a member thereof, and the genuineness of his signature shall be certified by the clerk of the court, under the seal thereof.

Inasmuch as the Appellant has the temerity to contend that certain other affidavits which were filed in the cause, made in Oregon by O. P. Coshow and Evelyn Johnson, were sufficient, independently of the void affidavit above mentioned, to sustain the order for publication of summons, we will set up the particulars respecting them, after noting some of the requirements of the Oregon law as to what must be shown by affidavit for

publication of summons, as found in Section 56 of Lord's Oregon Laws:

When service of summons cannot be made as prescribed in the last preceding section, and the defendant after due diligence cannot be found within the state, and when that fact appears by affidavit to the satisfaction of the court or judge thereof, or the judge authorized to grant the order herein provided * * * the court or judge * * * shall grant an order that the service be made by publication of a summons in either of the following cases* * * :

3. When the defendant is not a resident of the state but has property therein.

The Court will note that the showing "that the defendant after due diligence cannot be found within the state" must be by *affidavit*, no other method of proving that fact being admissible under the statute; and also that it is absolutely essential that the defendant shall have property in the state.

Now the affidavits which the Appellant contends are sufficient, disregarding the void so-called affidavit made outside the state of Oregon, are the ones sworn to by O. P. Coshow and Evelyn Johnson. These affidavits appear at pages 83, 92 and 93 and are as follows:

I, O. P. Coshow, being first duly sworn, say that I am one of the plaintiff's attorneys in the above entitled action. That the postoffice address of neither of the defendants could be ascertained at the present time. That I prepared the affidavit to John W. Johnson filed herewith and mailed it to his at-

torney at Hoquiam, for his examination. That I requested information regarding the present post-office address of both said defendants and was informed by plaintiff through his attorney that the same is unknown to him, and could not be ascertained by him through inquiry among the former associates and friends of said defendants at Hoquiam, or by other means.

That the last known postoffice address of defendants is as follows: Aaron Johnson at Hoquiam, Washington; Eline Engebritson, at Seattle, Washington, but the local address is not known.

O. P. COSHOW.

Subscribed and sworn to before me this 9th day of September, 1907.

DEXTER RICE,

(Seal.)

Notary Public for Oregon.

I, O. P. Coshow, being first duly sworn say: That heretofore, on the 9th day of September, 1907, Hon. G. W. Wonacott, County Judge, duly made an order for publication of summons in the above entitled action, and directed that copies of said summons be forthwith mailed to the defendants, and each of them, at Hoquiam, Washington; that on the 10th day of September, 1907, I caused copies of said summons and copies of the complaint, duly certified, to be mailed to said defendants, separately, as shown by the affidavit to Evelyn Johnson hereto attached, marked Exhibit A, and made a part of this affidavit; by inadvertance I neglected and omitted to have said

summons published and summons has not been published in this action; that both of said letters addressed to the defendants as aforesaid, at Hoquiam, Washington, have been returned unopened and uncalled for; that the address of either of the defendants is unknown to the plaintiff and cannot be ascertained with reasonable diligence; that due and strict enquiry has been made to ascertain said addresses from the former friends of the said defendants living at Hoquiam, Washington, by the plaintiff and his attorneys at Hoquiam, C. W. Hodgdon, and no one can be found who knows their addresses.

O. P. COSHOW.

Subscribed and sworn to before me this 11th day of October, 1907.

DEXTER RICE,

(Seal.)

Notary Public for Oregon.

I, Evelyn Johnson, being first duly sworn, say that I am a citizen of the United States, over the age of twenty-one years. That on the 10th day of September, 1907, at Roseburg, Oregon, I deposited in the United States Postoffice, enclosed in an envelope securely sealed, and with postage fully prepaid, a copy of the complaint and summons, directed to be published, in the above entitled action, duly certified to be such copies by O. P. Coshow, an attorney for the plaintiff, plainly addressed to the above named defendant, Aaron Johnson, Hoquiam, Washington; and also a like copy of said summons and complaint, enclosed in an envelope, with postage fully prepaid,

as aforesaid, and plainly addressed to the above named defendant Eline Engebritson, Seattle, Washington.

That I am not related to either the plaintiff nor defendant named above, nor am I a party to said action.

EVELYN JOHNSON.

Subscribed and sworn to before me this 10th day of September, 1907.

(Seal.) DEXTER RICE,
Notary Public for Oregon.

The Court will note that there is not a word in these affidavits touching the point of whether or not the defendants after due diligence could be found within the State of Oregon, which is the absolutely essential point required by law to be shown by affidavit; and which cannot be shown in any other way. Neither does the court in the order for publication find that such fact has been shown by affidavit; merely reciting that "it appearing to the satisfaction of the court that neither of the defendants above named can be found within the State of Oregon"; the recitations containing no reference to a showing by affidavit and omitting any finding as to diligence.

We have gone into detail respecting the affidavits, because the contention that these different sworn declarations of Mr. Coshow and Evelyn Johnson would suffice to sustain the order of publication seems to us to be disposed of beyond the point of argument, by merely setting forth what the affidavits in fact contained.

The respondent has a complete title by chain of *mesne* conveyances from the Government to itself; and for the appellant to have a decree in his favor, it is necessary for him to establish the validity of the sheriff's deed which he has put in evidence, based on the court proceedings in Douglas County.

The appellant is in Court, not only as defendant to deny and overcome the title of the plaintiff as made out by said chain of deeds, but as a cross-complainant, setting up his title by virtue of the execution sale, and seeking to have the same quieted against the plaintiff (see page 23 of the printed abstract). Plaintiff, the respondent here, has answered the cross-bill, setting forth the facts on which it relies to overthrow said judgment and execution sale; to which answer no replication was made.

Appellant seeks throughout his statement of the case and the argument to make it appear to the Court that the respondent's contest against the validity of the execution sale is founded solely upon matter apparent on the face of the judicial record in Douglas County; which is not true. It has been urged in the pleadings and at every stage of the case and is here earnestly maintained by Respondent that the judgment and execution sale were totally void for want of property in the custody of the court to give jurisdiction for proceedings by constructive service of summons. This is matter extrinsic to the record of the action in the Douglas County court.

The plaintiff's contention is that the Court never acquired jurisdiction of either the person of the defendant,

Aaron Johnson, or the property involved, to render any judgment, and that the proceedings on execution, whereby the defendant Johnson derails his title, are therefore void. This contention is based on the following points:

1. No affidavit showing the facts required by the statute to be shown as the basis for a service of summons by publication was ever filed in the case;

2. No property of the defendant Aaron Johnson, against whom judgment was given and execution was issued was attached therein.

We claim that each of these defects is jurisdictional. We understand the position of the defendant to be that the proceeding was strictly *in rem*, and that the failure to observe the statutory provisions for notice to the defendant before the rendition of judgment was not fatal, so far as a judgment against the property seized under attachment was concerned; in other words, that the only essential things were a valid seizure and a condemnation of the property to pay the debt.

The only thing in the way of an affidavit on which the order of publication could have been made is a document pretending to be an affidavit made before a Notary Public outside the state. We will discuss its legal status later.

Our contention is also that inasmuch as Aaron Johnson had no title, legal or equitable, to the property, at the time of the attempted attachment thereof, such attachment was a nullity.

It is absolutely essential to the validity of the judgment rendered in the Circuit Court of Douglas County that property of Aaron Johnson should have been attached as a basis for the service of summons by publication. This point was determined once for all in *Pennoyer vs. Neff*.

It affirmatively appears in this case that the said Aaron Johnson was not the owner of the property at the time of the attempted attachment. There is no proof of his ownership, and, on the contrary, the deeds introduced in evidence show that he had, long before the action was filed, conveyed the property in question to another. No reconveyance was made to him until over a week after the attempted attachment. It not appearing that at the date of the levy he had the title to the property, legally or equitably, but the proof indicating the contrary, it follows that the same was not subject to attachment in an action against him, and the foundation for publication service falls away.

No affidavit was filed showing that he was the owner of this or any other property in the State of Oregon, and the Court never made any finding that he was the owner of such property.

It is to be borne in mind that Andrew Johnson, who owned the land on April 1, 1907, the day it was attached, was not a party to the action.

This chain of deeds by which title had passed out of Aaron Johnson long before the attempted attachment, and did not come back to him until eleven days after the levy, is all admitted by the appellant in the pleadings and

the argument. The only suggestion we get in answer to these solid and admitted facts is the theorizing of counsel for appellant, based on the recitations of these several warranty deeds. Appellant's counsel says, that the only consideration expressed in the deed of Andrew to Aaron delivered April 12, 1907 (printed transcript, page 123), is one dollar; in which statement counsel is in error, the deed reciting one dollar and other valuable considerations; and appellant's counsel draws the conclusion from this erroneous statement of fact that the title must all the time have been in Aaron. And because Aaron, who was simultaneously receiving the warranty deed whereby the title became vested in him, was on the same day delivering a warranty deed in which he warranted himself to be the owner, the conclusion is drawn that he was and had been for several weeks before that, the owner.

If such declarations are entitled to consideration (we believe them to be pure hearsay), the record shows that the deed by which Aaron had conveyed to Andrew was with general warranty. That amounts to Aaron's declaration that Andrew thereby became owner. Then the record shows a deed not signed until April 8th, and not delivered until April 12th, 1907, by which Andrew warrants that he is, at the date of the execution of the deed, the owner in fee simple. Surely these two declarations offset the declaration of Aaron, not intended to take effect until he should have received a re-conveyance of the property, that after such re-conveyance he was owner; and counsel for appellant has nothing upon which to base his theorizing.

POINTS AND AUTHORITIES.

1. *Where the statute prescribes the persons by whom affidavits may be taken, the enumeration of particular officers amounts to an exclusion of all others not enumerated as qualified, and an affidavit is not receivable and in fact is no affidavit in the contemplation of the law unless it be taken before some one of the officers mentioned in the statute.*

Fawcett v. Chicago Ry. Co., 113 Tenn. 246; 81 S. W., 839.

Ramy's Representatives v. Kirk, 9 Ky., 267.

Scull v. Alter, 16 N. J. Law, 147, 151.

Love v. McAllister, 42 Ark., 183 & 185.

Murdock v. Hillter, 45 Mo. App., 287.

Brunswick Hdw. Co. v. Bingham, 107 Ga., 272; 33 S. E., 56.

Desnoyers Shoe Co. v. 1st Natl. Bank, 188 Ill., 371; 58 N. E., 994.

Jackson v. State, 67 N. E., 690 (Ind.)

Metcalf v. Carr, 133 Mich., 123; 94 N. W., 734.

Turtle v. Turtle, 52 N. Y. Sup., 857.

Manheimer v. Dosh, 74 N. Y. Sup., 922.

Fitch v. Campan, 31 Ohio St., 646.

Ferris v. Coml. Natl. Bank, 158 Ill., 241; 41 N. E., 1118.

Parke Davis & Co. v. Rouden, 117 N. Y. Sup.,
945.

Stanton v. Ellis, 16 Barb., 319; affirmed 12 N. Y.,
575.

We quote from some of the foregoing decisions:

In *Fawcett v. Chicago Railway Co.*, *supra* (p. 840), the Court holds that an oath taken before a Notary of another state is void. "The administration of the oath is a judicial matter. An indictment for perjury may be predicated upon such an oath falsely and corruptly taken when taken before an officer authorized to administer it. * * * * In addition we have no statute conferring on a foreign notary public the power to administer this oath. * * * * Without these enabling provisions such acts would be nugatory; for this power to administer oaths does not pertain to the office of notary public by usage or custom, except so far as is required in the transaction of commercial affairs. Wherever such power exists it is by virtue of a statute."

Ramy's Rep. v. Kirk, *supra*, holds an oath taken before a Justice of the Peace of another state is no evidence of the fact stated.

Scull v. Alter, *supra*, says (p. 151):

"There was another fatal objection taken by counsel for the plaintiff in the argument; namely, that the affidavit of Alter purported to have been taken before a Justice of the Peace of the County of Philadelphia, in Pennsylvania. The third section of the act requires creditors to make their claims under

oath of affirmation; it does not say before whom, but upon principle and the uniform decisions of this court, affidavits when required by law must be taken before the officer prescribed, or if none is indicated by the statute, before a judge of the court that has jurisdiction of the subject matter and is to pass upon its sufficiency and effect. We cannot take notice of the acts of a foreign officer unless required to do so by statute or some settled rule of law, and this affidavit must therefore be treated as a nullity."

Love v. McAllister, *supra* (p. 185), holds an affidavit void which was made before the clerk of the court of another state.

"The officers before whom an affidavit may be made out of the state being mentioned in the statute, an affidavit before an officer not named is of no validity in this state."

Murdock v. Hillyer, *supra*, holds the judgment void where the affidavit of service made outside the state was taken before the deputy clerk of a court of record, he not being qualified by statute to take the affidavit.

In Brunswick Hdw. Co. v. Bingham, *supra*, the affidavit for publication was taken before a notary public of another state. The Court says (p. 57):

"In order, however, to accomplish the purpose and render service by publication valid, the provision of the statute must be fully complied with. As a basis the plaintiff must make an affidavit that the corporation has no public place of doing business, or

no individual in office upon whom service may be perfected. A written statement to this effect does not authorize the service by publication, and where it is required that an affidavit shall be made, reference is had to an affidavit which is legal and valid in contemplation of law. * * * In the present case the paper purported to have been verified before a person who signed himself 'Notary Public, Wayne County, Michigan.' * * * Tested by the general rule which obtains and the prior decisions of this Court, the paper filed by the defendant in error in the Superior Court of Glynn County to obviate the requirements of the ordinary rule as to service of process, must fail because it was not an affidavit in the sense of the statute."

Desnoyer Shoe Co. v. First National Bank, supra, holds that an affidavit taken before a notary public of another state without proof of his authority to take oaths under the law of the state of his residence, is not an affidavit at all. The Court says (p. 995):

"By the general law merchant, a notary public did not have the power to administer oaths. Such authority is only conferred by statute and will not be presumed to exist, but must be proven. *** * The supposed affidavit of J. B. Desnoyers above set forth, sworn to in the State of Missouri, under said statute as heretofore construed by this Court, was void for the reason that the notary made no certificate of his authority to administer oaths under the laws of the State of Missouri, and there was no other evidence of such fact filed therewith."

Jackson v. State, *supra*, was a case where affidavits on motion for a new trial, after a conviction of murder, were verified before a notary public in another state. The Court says (p. 691):

"Assuming, however, that the motion for a new trial properly presents the question of newly discovered evidence, we should be compelled to hold that there were no affidavits in support of the motion as required by many decisions of this Court, for the reason that what purports to be affidavits taken in the State of Tennessee are not authenticated in accordance with the requirements of Sections 483 and 1865 of Burns' Revised Statutes, 1901, and cannot, therefore, be received and used as such in the courts of this state. Authority to take and certify affidavits does not belong to the office of a notary public at common law, but whether it does or not is immaterial, since a legislative enactment is paramount to the common law, and the above statute specifically prescribes how an affidavit taken in a foreign state must come authenticated to receive faith and credit in our courts. * * * * * The fixing of the specific mode of authentication must be held to exclude all other modes, and hence the courts have no authority to heed an affidavit that is not vouched in the manner provided by law. * * * * * They were, therefore, ineffectual as affidavits and entitled to no greater consideration than sworn statements. The newly discovered evidence, therefore, was not brought before the court in such way as warranted its consideration."

There are other Indiana cases to the same effect.

Metcalf v. Carr, *supra*, holds an affidavit made before a notary public of another state containing no clerk's certificate of the authority of the notary, to be void; the statute requiring such authentication.

Turtle v. Turtle, *supra*, was a case where an affidavit was presented, sworn to before a notary public of another state. The Court held that it was not entitled to be read, not being taken before one of the persons authorized by statute.

Ferris v. Commercial National Bank, *supra*, says of affidavits taken before a notary public in Canada. At page 119 it is said: "The purported affidavits taken in the Dominion of Canada were void and could not properly have been considered by the Court. The notaries public before whom the papers were sworn to gave no certificate of their authority to administer oaths in the Dominion of Canada. Revised Statutes, Chapter 101, Par. 6."

Parke, Davis & Co. v. Rouden, *supra*, holds that an affidavit taken before a notary public of another state without the certificate thereto called for by statute, cannot be read in evidence.

Stanton v. Ellis, *supra*, holds that an affidavit of publication made before a Master in Chancery is of no force or validity whatever, and furnishes no proof that the order to show cause was published.

2. *To sustain the judgment, the record must show affirmatively the facts which bring the case within the statute allowing a service of summons by publication.*

In case of service by publication, the record must show the facts which bring the case within the statute allowing such service. *Neff v. Pennoyer*, Fed. Cas. No. 10,083; 17 Fed. Cas, p. 1288.

A statute required summons on a non-resident defendant to be published four weeks. The decree recited, "And it further appearing that the defendant had been served by publication as required by law." Held, that jurisdiction over the person of the defendant will not be presumed, it appearing by the filing of the complaint that four weeks could not have intervened between the time of filing and the rendition of the decree. The compliance with the requirements of the statute must affirmatively appear from the record itself. *Northcut v. Lemery*, 8 Ore., 316.

"In a proceeding in which the Circuit Court exercises a special jurisdiction, conferred by statute, the facts showing jurisdiction must affirmatively appear." *City of St. Louis v. Gleason*, 8 S. W., 349.

"Courts of general jurisdiction, when engaged in the exercise of special and limited statutory powers, are confined strictly by the authority given, and jurisdiction must appear on the face of the proceedings." *City of Kansas v. Ford*, 12 S. W., 347.

There is no presumption in favor of the jurisdiction of a court of general jurisdiction exercising special powers, but the record must show the existence of jurisdictional facts. *Glos v. Woodward*, 67 N. E., 3; 202 Ill., 480.

The law presumes nothing in favor of the jurisdiction of a court exercising special statutory powers, as in condemnation proceedings, and the record must affirmatively show the facts necessary to give jurisdiction. *Illinois Central RR. v. Hasenwinkle*, 83 N. E., 815.

As to courts of general jurisdiction, in the exercise of special powers conferred by statute and not exercised according to the course of the common law, nothing will be presumed to be within the jurisdiction which does not distinctly appear to be so, and the jurisdiction, both as to the subject matter and as to the persons, must appear by the record. *Cobe v. Guyer*, 86 N. E., 1071; 237 Ill., 516.

A court of general jurisdiction which takes cognizance of a cause pursuant to statutory authority and not in conformity with the common law, becomes an inferior court, and its proceedings are subject to all the incidents applicable to an inferior court, so that its record must affirmatively show that jurisdiction of the person against whom a judgment was rendered, was secured in the manner prescribed, in order that the judgment should not be open to attack, as no presumptions can be invoked to supply any omissions. *DeVall v. DeVall*, 109 Pac., 755; 57 Ore., 128.

Where special powers conferred upon a court of general jurisdiction are brought into action according to the course of common law * * * * by seizure or attachment of the property where a judgment *in rem* is sought, the same presumption of jurisdiction will usually attend the judgments of the court as in cases falling within its gen-

eral powers. But where the special powers conferred are exercised in a special manner not according to the course of the common law, or where the general powers of the court are exercised over a class not within its ordinary jurisdiction upon the performance of prescribed conditions, no such presumption of jurisdiction will attend the judgment of the court. The facts essential to the exercise of the special jurisdiction must appear in such cases upon the record. *Galpin v. Page*, 18 Wallace, 350.

In summary proceedings where a court exercises an extraordinary power under a special statute which prescribes its course, that course ought to be strictly pursued and the facts which give jurisdiction ought to appear on the face of the record; otherwise the proceedings are not merely voidable, but absolutely void, as being *coram non judice*. *Thatcher v. Powell*, 6 Wheaton, 119.

A domestic judgment purporting to have been rendered upon service by publication is held subject to collateral attack, because the record does not contain an affidavit of non-residence and an order for publication, which were required by statute as conditions of service by publication. *Palmer v. McMaster*, 8 Montana, 186; 19 Pac., 585.

The "full faith and credit" clause is subordinate to one dominant principle, and but one; that is the principle which requires the jurisdictional status of the court to be clearly shown. A court acting without jurisdiction spreads upon its records a mere nullity. *Virginia Public Works v. Columbia College*, 84 U. S., 521.

Where a court is called on to exercise a power specially bestowed on it by statute, not within its ordinary powers and jurisdiction, the fact that the notice prescribed in the statute was given, it being a jurisdictional fact, must appear on the face of the proceedings. *Donlin v. Hettinger*, 57 Ill., 348.

3. *The presumption which the law implies in support of the judgments of superior courts of general jurisdiction arises only as to jurisdictional facts concerning which the record is silent; and when it discloses the evidence on which service by publication was had, and this was ineffectual, it will not be presumed that other evidence was presented, but the judgment will be void and open to collateral attack.* *Johnson v. Hunter*, 147 Fed., 133.

While the presumption of jurisdiction and the regularity of proceedings in a court of general jurisdiction protects its judgments from collateral attack when the record is silent regarding alleged defects, there is no room for that presumption * * * * when the record discloses lack of jurisdiction. *Indiana & Arkansas Lumber Co. v. Brinkley*, 164 Fed., 963.

The recitals in a judgment as to due citation by publication are not conclusive, where the return of the sheriff and the actual publication appear in the record and are insufficient. *Newman v. Crowls*, 60 Fed., 220.

Where a journal entry of a finding recited that minor defendants had been duly served as by law required "as shown by the return of the sheriff," such return was made the basis of the finding and was an essential part

thereof; and where such return was insufficient, such finding was not conclusive in a collateral attack on the judgment entered thereon. *Harris v. Sargeant*, 60 Pac., 608; 37 Ore., 41.

Statute providing for service of summons by leaving a copy of the petition and writ at defendant's usual place of abode * * * * judgment by default, on failure of return of service of summons to show that a copy of the petition and writ was left "at the usual place of abode" of defendant, is void and may be attacked in a suit based thereon. 65 S. W., 237 (Missouri).

Where the record shows defective service or want of service, no contrary presumption can arise. *Newman v. Crows*, 60 Fed., 220.

If the record shows the manner of service, nothing will be presumed in an inquiry, but the court will determine whether it was good. *Falkner v. Guild*, 10 Wis., 563 (506).

Where facts defeating the jurisdiction of the Chancery court appeared affirmatively on the face of the record, there was no presumption of the regularity of the proceedings, so that its decree could be attacked collaterally or directly. *Ayres v. Anderson-Tully Co.*, 116 S. W., 199.

4. *The recitals in a judgment as to due citation are not conclusive.*

Though the record recites acquisition of jurisdiction by publication, the presumption does not prevail against insufficient return of sheriff on record. *Newman v. Crows*, 60 Fed., 220.

"The recital of due notice in the record of a proceeding under special statutory authority must be read in connection with that part of the record which gives the official evidence prescribed by statute. No presumption will be allowed that other or different evidence was produced; and if the evidence in the record will not justify the recital it will be disregarded." *Cissell v. Pulaski Co.*, 10 Fed., 891 (894).

* * * * * Where the record shows substituted service was not made as prescribed by statute, a recital in the judgment of "process being duly executed" is not conclusive. *New River Mineral Co. v. Seeley*, 120 Fed., 193 (see p. 201).

The recital in proceedings for divorce of facts necessary to give jurisdiction may be contradicted in suit between the same parties in another state. *Bell v. Bell*, 181 U. S., 175.

Record recitals of jurisdictional facts do not render such judgment conclusive in suit in another state wherein such judgment is relied upon. The defendant may contradict the record showing service of process. *Knowles v. Gas Light Co.*, 19 Wallace, 58, 61.

Held, that a general finding or recital in a domestic judgment or order of "due service" would not avail to support the judgment or order upon collateral attack where the actual service shown by the record was not in compliance with the statute. *Michel v. Hicks*, 19 Kansas, 578.

The finding of a court in favor of its jurisdiction is not conclusive, especially when the record discloses the

evidence of jurisdiction upon which the court acted. *Senichka v. Lowe*, 74 Ill., 274.

Recitals in a decree which the process and return show cannot be true are not authority for the decree. The process will control, not the recital. *Davis v. Reaves*, 7 Lea. (Tenn), 585.

Though a judgment recites jurisdiction, yet if want thereof affirmatively appears on the evidence of the whole record, it will be held void on collateral attack. *Wick v. Rea*, 103, Pac., 462.

5. *Any fact may be alleged or proved which goes to take away the jurisdiction.*

Any fact upon which the jurisdiction depends may be denied unless, *perhaps*, in the case where the objection had been taken in the court whose jurisdiction is questioned and it has been made the subject of an express decision of the court. *Hickey v. Stewart*, 44 U. S., 750.

Any fact may be alleged or proved which goes to take away the jurisdiction; for example, jurisdiction of the person is acquired by due service of the process prescribed by law or by such notice as the law prescribes, and in the absence of such notice a judgment will be voidable. *Wort v. Finley*, 8 Blackf., 335 (Ind.)

A domestic judgment rendered on service by publication, held subject to collateral attack because it appeared from the record that the affidavit of non-residence prescribed by the statute was filed after and not before the service, as required by the statute, and notwithstanding the recital in the judgment that the sum-

mons had been duly served. If the record sets forth the manner in which the summons was served and that is ineffectual to confer jurisdiction, it will not be presumed that a valid service was made in some other way. *Barber v. Morris*, 37 Minn., 194, 33 N. W., 559.

A domestic judgment purporting to have been rendered upon service by publication held subject to collateral attack because the record did not contain an affidavit of non-residence, and an order for publication, which were required by statute as conditions of service by publication. *Palmer v. McMaster*, 8 Mont., 186, 19 Pac., 585.

6. *The Federal Court will not give to the judgment of a State Court any greater weight than the State Court would give.*

"Federal courts in a special statutory proceeding will not give to a judgment of a state court any other effect as evidence or as ground of action than must be lawfully given to it in courts of the state whose laws are invoked to enforce it." *Chase v. Curtis*, 113 U. S., 460.

The Federal court will not declare a state judgment *res adjudicata* where it would not be estopped under state law. *Cooper v. Brazelton*, 135 Fed., 476, 479.

7. *A statute authorizing a suit to be commenced against a non-resident upon constructive service of summons by publication is in derogation of the common law, and its provisions must be strictly performed in order to sustain the judgment recovered. A failure to comply with any of its requirements will be fatal.*

Gray v. Larrimore, Fed. Cas. No. 5721.

Earle v. McVeigh, 91 U. S., 508.

Settlemier v. Sullivan, 97 U. S., 449.

8. *The tendency of modern decisions everywhere is, that the jurisdiction of the court or other tribunal to render judgment affecting individual rights is always open to inquiry, when the judgment is relied on in any other proceedings.*

Kilbourn v. Thompson, 103 U. S., 197.

Price v. Shaeffer, 161 Pa., 530; 25 L. R. A., 699;
29 Atl., 279.

Thompson v. Whitman, 85 U. S., 457.

Coons v. Throckmorton, 25 Or., 59.

Galpin v. Page, 85 U. S., 350.

Neff v. Pennoyer, 3 Sawyer, 274.

Odell v. Campbell, 9 Ore., 298.

Phoenix Bridge Co., v. Castleberry, 131 Fed.,
175.

Cooper v. Brazelton, 135 Fed., 479.

Cohen v. Portland Lodge No. 142, B. P. O. E.,
144 Fed., 270.

Newman v. Crows, 60 Fed., 220.

Nobel v. Union River L. R., 147 U. S., 173.

Windsor v. McVeigh, 93 U. S., 274.

Old Wayne Mutual Life Assn. v. McDonough,
27 S. Ct. R., 238.

Rich v. Mentz, 134 U. S., 642.

9. *The affidavit showing the essential facts required by the statute is a jurisdictional prerequisite to constructive service of summons. Where such affidavit is wholly lacking, or even where it is entirely lacking in some of the essential facts which the statute prescribes are to be shown by affidavit, the order for publication is void, the court being without jurisdiction to order service by publication, and any judgment resting on such a publication is void.*

Columbia Screw Co. v. Warner Lock Co., 138 Cal., 445; 71 P., 498.

Guinn v. Elliott, 123 Iowa, 183; 98 N. W., 625.

Gilmore v. Lampman, 86 Minn., 493; 90 N. W., 113.

Roosevelt v. Ulmer, 98 Wis., 356; 74 N. W., 124.

Romig v. Gillett, 10 Okla., 186; 62 P., 805.

Kahn v. Matthai, 115 Cal., 692; 47 P., 698.

Mills v. Smiley, 9 Idaho, 330; 76 Pac., 783.

Spalding v. Fahrney, 108 Ill. App., 602.

Tobin v. Brooks, 113 Ill. App., 79.

Diggs v. Ingersoll, 28 So., 825 (Miss. 1900).

Moord v. Summerville, 80 Miss., 323; 31 So., 793.

Wright v. Hink, 193 Mo., 130; 91 S. W., 933.

Grigsby v. Wopschall, 127 N. W., 605 (S. D. 1910).

Kennedy v. Lamb, 182 N. Y., 228; 74 N. E., 834.

Simensen v. Simensen, 13 N. D., 305; 100 N. W., 708.

Anderson v. Anderson, 229 Ill., 538; 82 N. E., 311.

Cordray v. Cordray, 91 Pac., 781 (Okla.)

Johnson v. Miner, 144 Cal., 785; 78 Pac., 240.

Bothell v. Hoellwarth, 10 S. D., 491; 74 N. W., 231.

In Johnson v. Miner, 144 Cal., 785, the law is well stated as follows:

“By the filing of the complaint the court acquired jurisdiction of the subject matter of the action, and was thereby placed in a position where it could proceed to acquire jurisdiction of the person of defendant. The defendant being a non-resident of the state, the law required the issuance of a summons, the issuance of a writ of attachment, and valid levy of the same upon defendant’s real estate situated in this state; also an order for publication of summons, based upon the necessary affidavit, and a due service of sumomns by publication. All these steps must be taken to give the court jurisdiction to enter final judgment against the defendant to the end that the said property of defendant might be applied in a lawful way to the satisfaction of the plaintiff’s cause of action. * * * The jurisdiction of the court to make the order of publication rests altogether upon the affidavit for publication showing the facts required by

the provision of Section 412, of the code of Civil Procedure. * * * The proceeding for the publication of summons is distinct and separate from the proceeding in attachment. The judgment against a non-resident is dependent upon both these proceedings, but neither of the proceedings is dependent upon the other."

10. *The rule that the filing of an affidavit making the statutory showing is a jurisdictional prerequisite to a valid service by publication prevails in Oregon.*

Pike v. Kennedy, 15 Ore., 425.

Colburn v. Barrett, 21 Ore., 29.

Goodale v. Coffey, 24 Ore., 355.

Smith v. Whiting, 55 Ore., 393.

11. *This rule is recognized in the Federal Courts as well as in the State Courts.*

McDonald v. Cooper, 32 Fed., 745.

Flint v. Coffin, 176 Fed., 872.

Romig v. Gillett, 187 U. S., 111; 23 S. C. R., 40.

City of Detroit v. Detroit City Ry. Co., 54 Fed., 1.

12. *The rule that a judgment based on service of summons by publication is void, where the affidavit on which the order of publication is based wholly fails to show some of the essential facts required thus to be shown by statute, and a fortiori where no affidavit is filed, applies on collateral attack on the judgment in question.*

Soule v. Hough, 45 Mich., 418; 8 N. W., 50.

Cummings v. Brown, 181 Mo., 71; 81 S. W., 158.

Charles v. Morrow, 99 Mo., 638; 12 S. W., 903.

Albers v. Kozeluk, 68 Neb., 522; 94 N. W., 521; 97 N. W., 646.

Stillman v. Rosenberg, 78 N. W., 913 (Iowa 1899).

Trowbridge v Allen, 48 Colo., 419; 110 P., 193.

Albers v. Kozeluk, *supra*, was a case where the affidavit upon which publication was granted was made before a justice of the peace who failed to state the venue; and this was the point relied on to invalidate the judgment on collateral attack. The Court says:

“In the light of these decisions, we think that this court has unmistakably committed itself to the New York doctrine that the affidavit must show upon its face the proper venue, or must disclose that the officer before whom it was executed was an officer of the county where the same was filed. We conclude, therefore, that the affidavit for service by publication was fatally defective, that no legal service of publication could be made thereunder, and that the court had no jurisdiction to entertain and try the foreclosure proceedings.

“It is earnestly insisted by the defendant that this is a collateral attack upon the foreclosure decree, and that the jurisdiction of the court to enter

the decree will be conclusively presumed, and that neither the sufficiency of the notice nor affidavit can be questioned or reviewed collaterally. We do not think that this position is tenable. The affidavit is jurisdictional to service by publication, and where there is no affidavit, or where the affidavit is fatally defective, the publication is void. *Atkins v. Atkins*, 9 Neb., 191; 2 N. W., 466. *McGavock v. Pollack*, 13 Neb., 535; 14 N. W., 659. *Rowe v. Griffiths*, 57 Neb., 488; 68 N. W., 20.

“The plaintiffs are not seeking to attack the decree in this case because of irregularities, but the claim is that the judgment is absolutely void; that what appears on its face as a judgment is not one, because of want of jurisdiction by the court to enter it.

“In *C. B. & Q. R. R. Co. v. Hitchcock County*, 60 Neb., 722; 84 N. W., 97; it is said: ‘In courts of general jurisdiction the rule is that the proceedings taken, including questions of jurisdiction, are presumed to be regular and in conformity with law. Where, however, the record discloses the jurisdictional steps taken, and it is made to appear that no jurisdiction was acquired over the defendant, the rule invoked is rendered unavailable. Where a court is without jurisdiction over a defendant, the judgment rendered is void, and may be attacked as such by any one whose rights are affected by its rendition, and its invalidity shown in any action in which it may be called in question.’ ”

13. *The rule that such judgments are void on collateral attack prevails in Oregon:*

Fishburn v. Londerhausen, 50 Ore., 374; 92 P., 1060.

Northcut v. Lemery, 8 Ore., 323.

Neff v. Pennoyer, 3 Sawy., 278; Fed. Cas., No. 10,083.

14. *And the same rule is recognized in the Federal Courts likewise on collateral attack on the judgment:*

Johnson v. Hunter, 147 Fed., 133.

Cohen v. Portland Lodge No. 142, 152 Fed., 357.

Meyer v. Kuhn, 65 Fed., 705.

Guaranty Trust Co. v. Green Cove Ry. Co., 139 U. S., 137-146.

Ritchie v. Sayres, 100 Fed., 520.

Frawley v. Pa. Casualty Co., 124 Fed., 259.

Howard v. DeCordova, 177 U. S., 613; 20 S. C. R., 817.

Howard v. DeCordova, 177 U. S., 613; 20 S. C. R., 817, was a suit brought to set aside on collateral attack a judgment of a state court on the ground that the affidavit upon which publication of summons was obtained was false. The syllabus is as follows:

A Federal court may take jurisdiction of a suit to set aside a judgment of a State court in the same state, when it is attacked for fraud and want of

jurisdiction because it was rendered on service by publication, the order for which was obtained by a false affidavit.

The Court, after reviewing some earlier decisions, says that thereby it has been decided that when the charges go to the jurisdiction of the state court such question can be examined in the court of the United States whenever the judgment of the state court is presented as a muniment of title, and continues:

“The alleged facts in the case before us bring it directly within this ruling. By Chapter 95, Sections 13 and 14, Laws of Texas, 1847 and 1848, p. 129, the affidavit by the plaintiff or his attorney as to the want of knowledge of the names of the parties defendant or their residence is made an essential prerequisite of the jurisdiction of the court to issue an order for publication. In other words, a summons by publication can only take place when the essential affidavit is previously made. In the state court the affidavit was therefore jurisdictional in its character; and its verity was directly assailed by the averments of the present bill, which were admitted by the demurrer.”

Much emphasis is placed by the Appellant on the proposition that the action in Douglas County by attachment was a proceeding *in rem*. A sufficient answer to this would be, even if the Court were so to find the fact, that no property of the defendant was in fact attached. But even if there were a valid attachment, we contend that the proceeding was not so far *in rem* that it would

be valid without due notice as prescribed by statute to the defendant by publication; and that such notice by publication would not be valid unless the Court had jurisdiction because of a proper showing in accordance with the statute, to make an order for the service of notice in that manner. An examination of the authorities respecting actions of that character will show that the proceeding is only quasi *in rem*, and it is not sufficient that there be a seizure of property under attachment; but there must also be a strict compliance with the statutory requirements as to constructive notice to the defendant himself. We quote from Wade on Attachments, Section 7:

“A suit by attachment is a personal one when first instituted. It may continue to the end a personal action or be changed in the course of its progress to a proceeding possessing the leading characteristics of an action *in rem*. The suit loses its personal character when there has been due service of the writ upon the property and a failure of personal service upon the defendant and he does not voluntarily appear. In case of the appearance of or personal service on the defendant the action proceeds as a personal one, with the added incident that the property attached remains under the control of the Court to answer any demand which may be established against the defendant by the final judgment in the case. Strictly speaking, under adhesion to definitions proceedings *in rem* are those where the mere control of the thing by the service of process on it and making proclama-

tion authorizes the court to decide upon it without notice to any individual. The notice is general and the whole world are parties. *Attachment suits clearly do not answer to this description in any of the states.* In New York it is held that the provisions of the Code upon this subject are personal in their character and render the individual alone liable to be so proceeded against who has been guilty of one or more of the acts intended to be redressed by this mode of procedure. (*Bogart v. Dart*, 25 Hun., 395). When the defendant appears to the action in whatever manner he may be served the suit proceeds as an ordinary civil action and the judgment is personal. (*Barnum v. Reed*, 73 Mo., 461). And in Missouri it was held by the majority of the court that an attachment suit was not such a proceeding *in rem* as that the *res* is a party to the suit; but the attachment was in aid of the remedy against the individual sued. (*Bray v. McClury*, 55 Mo., 128).

* * * When property is seized by name and the action is brought against the thing, instead of the owner, the proceeding is purely *in rem* * * * and when the action is against a non-resident or absent defendant, where there is neither appearance nor personal service, it is styled an action *in rem* for the reason that the judgment does not go beyond a condemnation of the property attached to the payment of the debt. *And yet the action is personal for the purpose of determining the question of indebtedness, whereas in proceedings strictly in rem the thing is adjudged derelict.* For the purpose of distinguish-

ing the proceeding by attachment from an independent action it is styled a provisional remedy."

We quote also from Cyc., Vol. 4, page 397, where it is said, citing numerous authorities:

"Attachment is sometimes spoken of as a proceeding *in rem*, but strictly speaking this is incorrect, as a proceeding *in rem* is taken irrespective of the parties and is binding on the whole world, while the attachment affects the particular debtor only and is binding on him alone. When no jurisdiction is obtained over the debtor's person the remedy partakes of the nature of a proceeding *in rem* in that it proceeds against the property in the custody of the Court and the judgment binds such property only; but where jurisdiction of the debtor's person is obtained, either by personal service or appearance, the proceeding is ordinarily *in personam* and a personal judgment is rendered. * * * Under the statutes of most states it is not a writ or process by which action is commenced, but a mere provisional remedy ancillary to the action commenced at or before the time when the attachment is sued out."

"*In rem* is a technical term used to designate proceedings or actions instituted against the thing, in contradistinction to personal actions which are said to be *in personam*." *Cunningham v. Shanklin*, 60 Cal., 118, at p. 125.

"Action *in rem* is understood to be a technical term taken from the Roman law and there used to distinguish an action against the thing from one against the person,

the terms "*in rem*" and "*in personam*" always being the opposite one of the other, an act *in personam* being one done or directed against a specific person, while an act *in rem* was one done with reference to no specified person, but against or with reference to the specific thing, and so against whom it might concern, or all the world." *Cross v. Armstrong*, 10 N. E., 160, at p. 164 (Ohio).

"If it be correct to say that no personal judgment can be rendered against a non-resident without actual personal service it would seem an idle formula to have citation by publication. * * * It is true that in proceedings strictly *in rem*, as in admiralty proceedings, there is no personal service and all the world are regarded as parties and bound by the proceedings. *But our proceedings by attachment, either against a citizen or a non-resident, are not proceedings in rem nor to be likened to it.* Paschal's Digest, Art. 156 reads: 'That no judgment shall be rendered in suits by attachment unless the citation or summons has been served in the ordinary way or by publication in the manner provided by law.' Certainly this statute contemplates a personal judgment, although service by publication. Personal judgments on service by publication are common to the proceedings in courts of most of the states of the Union, and their validity and force has been almost universally recognized within the jurisdiction where they are rendered." (Citing 9 How., 350; 24 How., 203). *Wilson v. Zeigler*, 44 Tex., 657, at p. 660.

"Proceedings by attachment are not strictly speaking proceedings *in rem*. Such proceedings are simply against specific property or interests therein. No person

is named in the proceeding as a party. The whole world is bound. The seizure is notice. It confers jurisdiction. No other prerequisite to jurisdiction is prescribed. Under our system the seizure of the property does not confer absolute jurisdiction. That jurisdiction is conditional. It will be defeated by failure to comply with a jurisdictional condition subsequent. * * * Service is essential to the preservation of a qualified jurisdiction which has already attached. It is not the case of a mere irregularity in procedure, but is jurisdictional in its character." *Rhode Island Hospital v. Keeney* (N. D.), 48 N. W., 341.

A suit commenced by attachment is not a proceeding *in rem*, but is personal against the defendant; and the judgment therein authorized is not merely one of condemnation of the property attached, but is personal and general, as in a suit commenced by summons and complaint. *Betancourt v. Eberlin*, 71 Ala., 461.

As to the property seized these (attachment) proceedings have frequently been styled proceedings *in rem*, but it is not altogether incorrect so to designate them, since the property is in *custodio legis* and is specifically subjected to the satisfaction of the plaintiff's demand; but such suits are also proceedings *in personam*, since it is the personal obligation of the defendant owner, which is the foundation of the suit, and it is not necessary that the property seized should have had any sort of connection with the contract sued on. The property seized is not the debtor of the plaintiff, but stands in the suit in which it is attached as the representative of its owner, the defendant. The right to attach is simply the right

to seize the property of the debtor and to deal with it as his representative. By the seizure of the thing the right becomes initiate and is consummated by the recovery of the judgment against the owner. If the defendant is served with process or appears and defends a general judgment may be rendered against him, upon which a general execution may issue. If the court fails to obtain jurisdiction of the person of the defendant, a general judgment is rendered, but its execution is restricted to the property seized.

15. *If a non-resident debtor have no property within a state, there is nothing upon which the state court can adjudicate in determining the demand of a plaintiff in its court against such non-resident debtor.*

Pennoyer v. Neff, 95 U. S., 723.

Noyes v. Barnard, 63 Fed., 785.

Iowa State Savings Bank v. Jacobson, 8 S. D., 298; 66 N. W., 453.

Paxton v. Daniell, 1 Wash., 22; 23 Pac., 444.

Foushee v. Owen, 122 N. C., 363; 29 S. E., 771.

McDonald v. Cooper, 13 Sawyer, 95; 32 Fed., 751.

Cooper v. Reynolds, 10 Wall., 318.

The Supreme Court of the United States in Cooper v. Reynolds, 10 Wall., 318, says:

“The court in such a suit cannot proceed, unless the officer finds some property of defendant on

which to levy the writ of attachment. A return that none can be found is the end of the case, and deprives the court of further jurisdiction, though the publication may have been duly made and proved in court. Now, in this class of cases, on what does the jurisdiction of the court depend? It seems to us that the seizure of the property—or that which, in this case, is the same in effect, the levy of the writ of attachment on it is the one essential requisite to jurisdiction, as it unquestionably is in proceedings purely *in rem*. Without this, the court can proceed no further; with it, the court can proceed to subject the property to the demand of the plaintiff. If the writ of attachment is the lawful writ of the court, issued in proper form, under the seal of the court, and if it is by the proper officer levied upon property liable to the attachment, when such a writ is returned into court the power of the court over the *res* is established.”

And in the subsequent and well-considered case of *Pennoyer v. Neff*, 95 U. S., 723, Mr. Justice Field said:

“It is in virtue of the state’s jurisdiction over the property of the non-resident situated within its limits that its tribunals can inquire into that non-resident’s obligations to its own citizens, and the inquiry can then be carried only to the extent necessary to control the disposition of the property. If the non-resident have no property in the state, there is nothing upon which the tribunals can adjudicate.”

16. *"The execution of a writing is the subscribing and delivering of it, with or without affixing a seal."*

L. O. L., Sec. 777.

Fain v. Smith, 14 Or., 82.

Shirley v. Burch, 16 Ore., 83.

Allen v. Ayer, 26 Ore., 589.

Tyler v. Cate, 29 Ore., 515.

Payne v. Hallgarth, 33 Ore., 430.

Swank v. Swank, 37 Ore., 439.

Young v. Gilbau, 3 Wall., 636.

Parmalee v. Simpson, 5 Wall., 81.

Ireland v. Geraghty, 15 Fed., 35.

Brumby v. Jones, 141 Fed., 318.

The answer of the appellant herein admits that Aaron Johnson deeded the property to Andrew Johnson as alleged in the complaint; and it is not controverted that such a deed was made and recorded long before the attachment, and that the record title stood in Andrew's name on April 1, 1907, the date of the attempted levy of the writ. The defendant alleges, referring to this transaction that "The fact is that, as your orator, John W. Johnson is informed and believes, such conveyance was either fraudulent and made for the purpose of defrauding the creditors of Aaron Johnson, of whom this, your orator, was one, or the same was intended as a mortgage to secure the payment of sums of money and was not in fact a conveyance of said estate; but that

whether this be true or not by the deed of April 8, 1907, the said Aaron Johnson became the owner in fee simple of such property heretofore described."

Now, we submit to your Honors that there is not one bit of evidence introduced in the case to sustain these allegations, either that the conveyance to Andrew was a mortgage, or was in fraud of creditors. This is a point on which the defendant assumed the burden of proof and has failed to produce evidence. An ingenious attempt is made to use the warranty clause of Aaron Johnson's deed to the plaintiff as a declaration on his part that he was owner at the time he signed the same, for which purpose it is clearly incompetent.

Moreover, it is to be borne in mind that the deed must speak from the date of its delivery, and it was the evident intent that the same should not be delivered, and it was not delivered, until Aaron received a conveyance from Andrew, which would make the warranty of vested title true. There is in the record a warranty deed of Andrew bearing a later date and reciting with as much positiveness that Andrew is the owner in fact. If one is evidence so is the other, and they offset each other, with the advantage on Andrew's side of holding the legal and record title. The transaction is entirely consistent throughout with a repurchase by Aaron from Andrew for the purpose of selling to the plaintiff. The Court will not presume fraud without evidence, but will presume the contrary; nor can the Court presume a mortgage without a scintilla of proof thereof. The burden was on the defendant herein to overcome the presumption of ownership arising from the legal title vest-

ed of record in Andrew by a regular conveyance; also the presumption of honesty in the transaction as opposed to fraud; also the burden of proof assumed by the affirmative allegations of the defendant's answer in this respect. On all these points the defendant has failed.

If the property did not belong to Aaron on April 1, 1907, we maintain that the levy of an attachment thereon was a nullity, and the whole proceeding falls to the ground.

The defendant partly admits his failure to make any showing of title in Aaron Johnson on the day of the levy, and to overcome this defect advances two propositions, neither of which is sustained by any law, the first being that the levy of the attachment having been made on April 1st, caught any after-acquired title which vested in Aaron Johnson by the deed of Andrew executed on the 8th, or whatever may have been its date of delivery thereafter; and the other contention being that the defendant is in some way a *bona fide* purchaser under his attachment.

We maintain that an attachment has no such legal effect as claimed. In the case of *Lackett v. Rumbaugh*, 45 Fed., 28, it is said:

"At the time when the garnishment was served on C. the precedent condition has not been performed by P. He had no absolute title to the money; no right of action; and all his claim to the fund had been transferred and he had no further power to control its disposition. The validity of the attachment depends upon the state of facts existing at the time

when levied. It cannot reach any liability of the garnishee accruing after the service of the process upon him. *Devries v. Summitt*, 85 N. C., 126. An attaching creditor cannot acquire any higher or better right to the property attached than the defendant in the main action had when the process was levied unless he can show some fraud and collusion by which his rights were attempted to be impaired." Cites authorities.

In *Crocker v. Pierce*, 31 Maine, 177, it is held that an attachment of land attaches only to the interest of the defendant therein at the time it is made and a subsequently acquired title does not inure to the benefit of the attachment plaintiff. To the same effect are:

McMillen v. Gerstle, 19 Colo., 98; 34 Pac., 681.

Meyer v. Paxton, 4 Tex. Civ. App., 29; 23 S. W., 568.

The foregoing part of this brief is devoted mainly to setting up the propositions and arguments on which we make out our affirmative case, though parts of it are applicable to meet the arguments of opposing counsel. We shall take up now more directly the consideration of the assignments of error and the propositions of law and arguments as to the facts upon which the appellant seeks a reversal.

We discuss first an assignment of error which seems to be abandoned in the brief, for it is not argued at all, viz: the third, which is that "The Court erred in holding that the requisite diversity of citizenship existed

to entitle the Court to entertain jurisdiction, for this, that the plaintiff is a citizen of Minnesota and the defendants are citizens of the state of Washington.”

We presume that counsel for the appellant, since assigning that error, have been reading some of the decisions which place the jurisdiction of the court to hear a case involving title to land within the district, and between citizens of different states, beyond dispute.

Jellenik v. Huron Copper Mining Co., 177 U.

S., 1; 20 S. C. R., 562.

Greeley v. Sawe, 155 U. S., 58.

Seybert v. Shamokin etc. Co., 110 Fed., 810.

Kuhn v. Morrison, 75 Fed., 81.

Tingle v. Scott Paper Mfg. Co., 55 Fed., 553.

Spencer v. Kansas City Stock Yard Co., 56 Fed.,
741.

Ames v. Holderbaum, 42 Fed., 341.

Lancaster v. Asheville St. Ry. Co., 90 Fed., 129.

Grove v. Grove, 93 Fed., 865.

U. S. v. Winans, 73 Fed., 72.

Dick v. Foraker, 155 U. S., 404.

Arndt v. Griggs, 134 U. S., 316.

Morrison v. Marker, 93 Fed., 692.

Citizens Savings & Trust Co. v. Ill. Cent. R. R.,
27; S. Ct., 425.

It is also clear beyond question that a suit to quiet title to land within the district is one of the kind of cases which come within the law giving the federal courts jurisdiction, as laid down in the authorities just cited.

Holland v. Challen, 110 U. S., 15.

Chapman v. Brewer, 114 U. S., 158, 170.

United States v. Wilson, 118 U. S., 89.

Moore v. Steinbach, 127 U. S., 70, 84.

Darragh v. Wetter Mfg. Co., 78 Fed., 7.

Lamb v. Farrell, 21 Fed., 5, 8.

Northern Pacific R. R. Co. v. Cannon, 46 Fed., 232.

Southern Pacific R. R. Co. v. Stanley, 49 Fed., 263, 265.

Prentice v. Duluth Storage & Forwarding Co., 58 Fed., 437.

Harding v. Guice, 80 Fed., 162.

Green v. Turner, 98 Fed., 756.

Willitt v. Baker, 133 Fed., 937.

U. S. Mining Co. v. Lawson, 134 Fed., 769.

Smith Oyster Co. v. Immel Oyster Co., 149 Fed., 555.

Fitch v. Creighton, 24 How., 159.

Reynolds v. Crawfordsville Bank, 112 U. S., 405, 411.

Devine v. Los Angeles, 26 S. C. R., 657.

This being beyond all controversy a case of which the court has jurisdiction, first by virtue of the citizenship of the parties, and second, by virtue of the subject matter, and third because it is of equitable cognizance, we pass to the consideration of the proposition laid down for argument as set out on page eleven of appellant's brief, viz: that "The federal court will not, in this proceeding, search the record of the Oregon state court for defects and informalities or errors apparent upon and judged by the face of the record." This seems to be intended as a summary of the first, second, fourth and eighth assignments of error. Briefly stated, the doctrine might be put thus: That although the case, namely, a suit to quiet title to real property within the district, is one of which the court has jurisdiction, and of which it is bound to take cognizance, and although the necessary diversity of citizenship exists; and although both parties have come into court and submitted their cases and prayed that the whole controversy be judged, and each has prayed for affirmative relief; yet there is something so sacred about a judgment of a state court void on its face for want of jurisdiction; that as soon as it appears that one of the parties is claiming under such a void judgment, the court must refuse further to hear the case of the real owner of the property, who seeks to have his title quieted, and must decree that the void title of the opposite party be confirmed.

Now, is there any rule of law in this country which prohibits a federal court to uphold the plaintiff's title against a void judgment, or a deed founded on a void judgment, of a state court, merely for the reason that

the fact which makes the judgment void appears on the face of the record? We think that it has never been so held. We admit that there are abundant decisions that a court of equity will not take jurisdiction to quiet a title when there is a remedy at law open to the parties and equally adequate; and that a court of equity will not take jurisdiction to restrain the carrying out of a judgment of a state court, when there is a plain remedy open to the suitor in the original proceeding, pending at the time in the state court. We think it will be found on careful examination that none of the cases cited by appellant goes further, in withholding jurisdiction, than what we have stated is the limit placed by the foregoing rules.

Appellant's whole case may be said to rest on the dictum of the court in *Little Rock Junction Railway v. Burke*, 66 Fed., 83. That was a suit brought by Burke to quiet title against the railway company; *the railway company being in possession of the property*. The court says that:

"Owing to the peculiar relations which exist between State and Federal courts of co-ordinate jurisdiction, the Federal court ought not to review, modify or annul a judgment or decree of the State court unless such review is sought on a state of facts not disclosed by the record of the State court."

This, if good law and applicable to the case, would not be a bar to our suit, because it is founded partly on the fact that no property belonging to the defendant Aaron Johnson was attached; which is not a fact ap-

parent on the face of the record, but has to be established by the deeds introduced in evidence. Therefore, our case would be taken out of the rule. It is well settled that if it is necessary and proper for a court of equity to take jurisdiction for the purpose of trying one issue, it will try all the issues.

Cathcart v. Robinson, 5 Peters, 264.

Ober v. Gallagher, 93 U. S., 199.

U. S. v. Union Pacific Railway Co., 160 U. S. 1.

Ward v. Todd, 103 U. S., 327.

Mason v. Hartford P. & F. R. Co., 19 Fed., 53.

Foley v. Hartley, 72 Fed., 570.

Continental Insurance Co. v. Garrett, 125 Fed., 589.

But we contend that if the lack of an affidavit as the foundation for the order of publication were the sole defect relied on, and the suit were therefore a collateral attack based entirely on a defect apparent on the face of the record of the State court, the doctrine of Little Rock Junction Railway Co. v. Burke would not be applicable. When the case is studied, it will be found that the reasons why the Federal court refused jurisdiction were:

1. "That the complainant could have obtained as full relief by a bill of review in the Chancery court as by an original bill filed in the Federal Circuit court." (p. 88).

2. "That it is a general rule that unless restrained by the terms of an express statute a court of superior jurisdiction has power at any time to vacate its own judgments when it appears from an inspection of its record that a particular judgment or decree is utterly void for want of a jurisdiction either over the person or the subject matter." (p. 88).

3. "The remedy by ejectment was also open to the complainant, for no doctrine is better established than that a sale under a decree that was rendered without jurisdiction confers no title and that such a decree is open to impeachment in any collateral proceeding when the want of jurisdiction is apparent upon the face of the record." (p. 90).

In passing, we respectfully call the attention of the Court and of opposing counsel to the fact that this case all the way through holds that the judgment in question was void, notwithstanding jurisdiction of the *res*; and that, too, for the very same reasons we are contending here to be sufficient to render void the judgment in the case at bar, namely, defects in the proceedings to summon the defendant.

Showing the inapplicability to the case at bar of the reasons given in *Little Rock Junction Railway Co. v. Burke* for refusing relief, we find:

1. That bills of review are expressly abolished by statute in Oregon. • Lord's Oregon Laws, Section 390.

2. That application for the vacation of a judgment cannot be made by the plaintiff here because he

was not a party to the case in which it was rendered; nor could it have appealed for the same reason; and even if it were otherwise it is held that the inherent jurisdiction of courts to vacate their orders or judgments continues in Oregon only to the end of the term during which they were rendered. *Brand v. Baker*, 42 Ore., 426.

3. Ejectment would not lie because the defendant is not in possession; it being admitted in the pleadings and at the trial that the land was vacant and unoccupied. Section 516, Lord's Oregon Laws, allows a suit in equity to be brought under such circumstances; that the Federal courts will grant the same relief is well established, as shown by cases cited above.

It is evident from the language used in the opinion in *Little Rock Junction Railway Company v. Burke* that if there had been any feature of the case which required the introduction of extrinsic evidence to establish the invalidity of the state court's judgment, jurisdiction would not have been denied; and there is such an issue in the case at bar, namely, the issue as to the ownership of the property at the time of the attachment.

National Surety Company v. State Bank, 120 Fed., 599, cited by appellant and by the lower court, is a good commentary on the meaning of the *Little Rock Junction Railway Company* case. It says of that case that it "failed because there was an adequate remedy at law by ejectment in the Federal court, if there was any remedy. The facts stated in the case appeared on the face

of the record in the State court and were as available in ejectment as in equity."

This case, taken as a whole, is favorable to the plaintiff herein.

The case of *Union Pacific Railway Co. v. Flynn*, 180 Fed., 565, on which appellant's counsel lay emphasis, was a suit for injunction against a pending proceeding in a state tribunal. It is held that:

"Where a property owner against which a special tax bill has been ordered claimed that the proceedings were void for lack of proper notice, it had an adequate remedy at law in the State court, either by a proceeding under Section 4, or by a *certiorari*, and hence could not maintain a bill in the Federal Circuit court to restrain the city clerk from attesting and the circuit clerk from filing the tax bills against its property on the theory that to do so would constitute a taking of property without due process of law."

This, we submit, is a very different situation from the one presented by our case. For, while opposing counsel contended vigorously in the lower court that we had a remedy at law, by action of ejectment, they appear now to have abandoned that contention, knowing it to be unfounded, and would leave plaintiff without any remedy whatever in the premises, contenting themselves with taking away his equitable remedy.

It ought to be clear also, we think, from an examination of all the cases cited by the appellant herein, that the only reason why, and the only case when, a Federal

court will refuse jurisdiction is that an adequate remedy at law exists in the particular case presented. If this controlling fact does not clearly appear, then jurisdiction will be taken. For example, in *Blythe v. Hinckley*, 84 Fed., 253, the Court, referring to *Little Rock Junction Railway Company v. Burke*, says the ground of that decision was:

“The Court holding that not only was a bill of review open to the complainant as a remedy, but the action of ejectment.”

And on page 256, speaking of the situation in *Blythe v. Hinckley*, the Court says concerning it:

“She was therefore in possession when the second amended and supplemental bill was filed; and against her at that time, so far as appears from the bill of complaint, a suit in ejectment by the complainants would have afforded a plain, adequate and complete remedy.”

The case was so treated on appeal. 173 U. S., 501; 19 S. C. R., 499.

Under the law of Oregon, the only remedy open to the plaintiff under the existing facts is a suit of the character here brought; and we think it is clear from the authorities we have cited that the Federal court ought, when such is the only remedy, and the citizenship of the parties is such as to authorize it, to take jurisdiction.

Then it is contended that this Court will not “examine into the irregularities and informalities in the proceedings before the Oregon court.”

If the points of attack on the Oregon judgment were "informalities and irregularities" we concede that Your Honors would not undertake to set aside the judgment on collateral attack; nor would any other Court. But we have never heard any court call a non-ownership of the property attached as the basis of constructive service, or the total absence of an affidavit on which to base an order for publication, an "irregularity or informality." On the other hand we have cited in this brief many cases holding that in the absence of property attached or an affidavit for publication, the ~~attachment~~^{judgment} is void on collateral attack. We find no cases to the contrary, nor does the diligence of opposing counsel disclose any. Indeed, the Court says, in *Cooper v. Reynolds*, upon which defendant most relies, that:

"The Court in such a suit cannot proceed unless the officer finds some property of defendant on which to levy the writ of attachment. A return that none can be found is the end of the case and deprives the Court of further jurisdiction, though the publication may have been duly made and proven in court."

It is to be conceded that there is language in *Cooper v. Reynolds* which, taken literally, would seem to dispense with the necessity of any publication of summons in an attachment suit. It follows as a matter of course that if the summons could be dispensed with the affidavit for its publication could be dispensed with as well.

The Court will note in *Cooper v. Reynolds*, on page 319, the following:

“So, also, of the publication of notice. It is the duty of the Court to order such publication and to see that it has been properly made, and undoubtedly if there has been no such publication a court of errors might reverse the judgment. But when the writ has been issued, the property seized, and that property has been condemned and sold, we cannot hold that the Court had no jurisdiction for want of a sufficient publication of notice.”

The foregoing means that the proceedings by attachment are *in rem* and that the vital process by which jurisdiction is acquired is the process against the property and not against the person; and no process against the person is requisite to the jurisdiction. This is the doctrine for which appellant contends herein, and which it is necessary for him to maintain in order to prevail.

That there *can be* proceedings *in rem* in which the process is against the property and no process by publication or otherwise against the party is necessary, we do not deny. In such cases the primary and essential fact to give jurisdiction is seizure of the property. If that be accomplished, then the Court has jurisdiction to render its judgment against all the world, and whatever else may be commanded is incidental and its non-observance will not subject the judgment to collateral attack.

But our contention is that under the laws of Oregon the attachment is ancillary only; that it is not a process by which the Court acquires jurisdiction, though it is essential that there be property within the jurisdiction of the Court and that the Court in some manner shall have control of the property before a judgment can be

rendered against a non-resident defendant who has not appeared or been served with summons within the state. We contend that the attachment is ancillary only and is not the method of summoning or warning a defendant to appear. An attachment of the property of the non-resident debtor is nowhere made a part of the process for bringing him into court by the statutes of Oregon. It is not made requisite by statute to the proceeding against him by publication of summons that there shall be an attachment. The section of the code covering the point (L. O. L., Sec. 56) says nothing about attachment, but says that the service of summons by publication may be made "When the defendant is not a resident of the state but has property therein and the Court has jurisdiction of the subject of the action."

The subject was quite fully considered by Mr. Justice Bean in *Bank of Colfax v. Richardson*, 34 Ore., 525, where it is said:

"Under our system an attachment is merely auxiliary to the main action, and there is no difference in the proceedings thereon in an action brought against a non-resident, upon whom service is necessarily made by publication, and in one brought against a resident of the state, in which personal service is had. In either case the proceedings on attachment have nothing to do with the merits of the cause of action or the jurisdiction of the court to try and determine the controversy between the parties. If personal service is had, the cause becomes a mere action *in personam*, with the added incident that the property attached remains liable for

any judgment the plaintiff may recover. But, if service is had by publication, and there is no appearance for the defendant, the action is practically a proceeding *in rem* against the attached property, the only effect of which is to subject it to the payment of the amount which the Court may find due the plaintiff. Where no personal service is had, the *res* is brought within the power and control of the court by a seizure under a writ of attachment, but the right to adjudicate thereon is acquired only by the publication of the summons. *It is the substituted service, and not the seizure*, which gives the court jurisdiction to establish by its judgment a demand against the defendant, and to subject the property brought within its custody to the payment of that demand. In other words, the authority to hear and proceed to judgment depends upon the service of the process and the actual seizure of the thing to be concluded by the judgment, and not upon the regularity of the proceedings by which the control of the property was acquired."

We take it that the "service of the process" in the foregoing refers to the service of the summons by publication, and we think it has always been so understood in Oregon.

A painstaking examination of every case given in Rose's Notes in which *Cooper v. Reynolds* is cited as having been followed, discloses that, with the possible exception of *Freeman v. Thompson*, 55 Mo., 183. and *Brown v. Rose*, 55 Neb., 200, no decision is referred to which has adopted the doctrine of *Cooper v. Reynolds*

respecting the non-necessity of publication of notice in attachment cases embodied in the extract above referred to.

Cooper v. Reynolds is criticised by Mr. Wade in his work on Attachment, Sections 6 and 46. It came up for consideration before the Supreme Court of Tennessee, in which state the case had arisen. The Tennessee court vigorously repudiated it as not laying down the law of that state in cases where the attachment is *ancillary*. See Walker v. Cottrell, 6 Baxt., 265, in which, after an exhaustive review, the Court says:

"We are of opinion that the decision in the case of Cooper v. Reynolds, 10 Wal., is not in conformity to the decisions of this court, and to hold in conformity to the opinion in that case would overturn the uniform current of decisions made by this court upon the office and effect of the levy of an ancillary attachment."

In some of the states, Ohio, for instance, attachment, followed by publication of a monition, is the method akin to the ancient *distringas* adopted for bringing an absent defendant into court, or subjecting his property to sale, if he does not appear. In such states the above doctrine of Cooper v. Reynolds respecting the acquisition of jurisdiction by attachment is recognized and was recognized, as for instance in Ohio, before Cooper v. Reynolds was decided.

On the other hand, the courts of the various jurisdictions, state and federal, where attachment is merely ancillary, Oregon for example, as laid down by Judge

Bean in the case of *Bank of Colfax v. Richardson*, hold the rule to be exactly the contrary.

No suit is begun in Oregon by the seizure of the property under a writ of attachment, which is just the vital point on which the whole matter turns. An action is begun in Oregon, according to Section 751, Lord's Oregon Laws, by filing a complaint with the Clerk of the Court. This is a proceeding *in personam*. At any time *after the action is commenced* the plaintiff may cause a summons to be served on the defendant. The attachment, according to Section 295, cannot issue before the summons, the provision being that "The plaintiff at the time of issuing the summons or any time afterwards may have the property of the defendant attached *as security for the satisfaction of any judgment that may be recovered.*" It is therefore clearly evident that in Oregon an action cannot be commenced by the issuance of a writ of attachment. It is not any part of the process by which an action is begun, but is merely ancillary, as security for the judgment.

The holdings are uniform that a valid attachment is not enough, but there must also be substantial compliance with the statute respecting constructive service of summons; among the jurisdictional requisites being the showing prescribed by statute to authorize the Court to make the order for service in that manner. We have cited many cases to sustain this point. The number which might be given is almost without limit; for every case in which a judgment has been held void on collateral attack for some defect in the summons or the proceedings leading up to it, notwithstanding a valid attachment,

is a case in point against the particular doctrine of *Cooper v. Reynolds* for which defendant contends here.

In *Cooper v. Reynolds*, the Court sets forth at the opening of the opinion the provisions from the laws of Tennessee under which the case was decided. After specifying in what cases an attachment may be sued out, subsequent sections of the code provide for publication for a fixed time in a newspaper published in the county where the suit is brought, of a memorandum or notice of the attachment, and declares:

“This memorandum or notice shall contain the names of the parties, the style of the court to which the attachment is made returnable, the cause alleged for suing it out, and the time and place at which the defendant is required to appear and defend the attachment suit.” (Sec. 3522).

“The attachment and publication are in lieu of personal service upon the defendant, and the plaintiff may proceed upon the return of the attachment duly levied, as if the suit had been commenced by summons.” (Sec. 3524).

It will be noted from the foregoing that the levy of the attachment is made the method of summoning the defendant. Commenting thereon, the Court says that “In this class of cases * * * the seizure of the property is the one essential requisite to jurisdiction, as it unquestionably is in a proceeding purely *in rem*.”

Now there is nothing analogous to this in the laws of Oregon. There is no provision for beginning a suit

by attachment of property, nor for publishing a notice of such attachment, and especially there is no provision that "the attachment and publication are in lieu of personal service upon the defendant and the plaintiff may proceed upon the return of the *attachment duly levied* as if the suit had been commenced by summons," which is the identical language of Sec. 3524 of the Tennessee code.

The Court goes on to say in the course of the opinion :

"We do not deny that there are cases * * * in which the Legislature has properly made the jurisdiction to depend on the publication of notice, or on bringing the suit to the notice of the party in some other mode, when he is not within the territorial jurisdiction."

Our contention is that the Legislature of Oregon has done this very thing and beyond doubt the Oregon courts have always so construed the legislative enactment. The method of calling in the defendant in a divorce suit, for instance, is precisely the same in Oregon as in an attachment action.

We comment briefly on some of the cases cited by appellant.

Matthews v. Densmore, 109 U. S., 216, and Erstein v. Rothschild, 22 Fed., 61, as shown by the appellant's quotation therefrom, discuss only the question of defects in the affidavits leading to the writ of attachment, which are everywhere held to be immaterial so far as obtaining jurisdiction of the defendant is concerned, *when the*

writ is ancillary only. Such is the holding in *Bank of Colfax v. Richardson*. On the contrary, in those states where the writ of attachment is the process employed to obtain jurisdiction to render judgment, the holdings respecting the affidavit for the writ are that it is absolutely essential.

Bigelow v. Chatterton, 51 Fed., 614, might appear from the extract in the brief of appellant's counsel to be fully in accord with the most extreme position of *Cooper v. Reynolds*; but an examination of the case discloses that all that is said along this line is dictum, for it appears that there was a summons regularly served. There had originally been a defect in the proof of publication, which the trial court had permitted to be cured by an amendment. The allowance of the amendment is held to have been proper, and it is said (page 618), "There-upon an affidavit of proof of publication of the summons was filed, which conformed in all respects to the requirements of the statute." There was, therefore, a due and proper service of the summons by publication, and the case never involved the question of validity of a judgment where no such service had been authorized or made.

Moreover, the Court seems to treat this showing of due service of summons by publication as an essential part in the acquisition of jurisdiction by the attachment, as Your Honors will note from the opening words of the decision as quoted on page 25 of appellant's brief herein.

Passing to the other cases cited by appellant on this point, we find that neither *Southern Bank & Trust Com-*

pany v. Folsom, 75 Fed., 929, nor Heid v. Ebner, 133 Fed., 156, involved any question of service of process on the defendant; and the same is true of Holmes v. Oregon & California Railroad Company, 9 Fed., 229, which, by the way, has long since been overruled on the only point it did decide. Phoenix Bridge Co. v. Castleberry, 131 Fed., 177.

National Nickle Company v. Nevada Nickle Syndicate, 112 Fed., 44, which is cited by counsel as "sustaining a judgment upon an insufficient publication," does not in fact involve any judgment on publication of service. The parties had all appeared personally and contested the suit. It was sought to attack the order of confirmation of sale from which no appeal had been taken.

Graff v. Lewis, 71 Fed., 591, was another case involving irregularities in the affidavit on which the writ of attachment was procured; and it holds, as does the Supreme Court of Oregon and almost every court before which the question has come, that such irregularities do not avail on collateral attack. Instead of being a case "very much like the case at bar," it has no resemblance to the case at bar; for so far as appears all the proceedings relating to the summoning of the defendant were perfectly regular.

In closing the discussion respecting Cooper v. Reynolds and the conclusions sought to be drawn therefrom, quotations *in extenso* from two decisions of the United States Supreme Court are given below, which explain and modify the doctrines of the earlier cases to such a

degree that it ceases to maintain any doctrine helpful to the appellant here. We claim for these decisions that they totally wipe out the impression which a superficial reading of *Cooper v. Reynolds* might create, that proceedings *quasi in rem*, like the one here, are so purely against the thing that no notice is required to give the court jurisdiction. These later cases, and many more in the same line cited at the close of this brief, establish the opposite doctrine.

We quote from *Windsor v. McVeigh*, 93 U. S., 279:

“A sentence rendered simply from the fact of seizure would not be a judicial determination of the question of forfeiture, but a mere arbitrary edict of the judicial officer. The seizure in a suit *in rem* only brings the property seized within the custody of the court, and informs the owner of that fact. The theory of the law is that all property is in the possession of its owner, in person or by agent, and that its seizure will, therefore, operate to impart notice to him. Where notice is thus given, the owner has the right to appear and be heard respecting the charges for which the forfeiture is claimed. That right must be recognized and its exercise allowed before the court can proceed beyond the seizure to judgment. The jurisdiction acquired by the seizure is not to pass upon the question of forfeiture absolutely, but to pass upon the question after opportunity has been afforded its owner and parties interested to appear and be heard upon the charges. To this end some notification of the proceedings, beyond that arising from the seizure, prescribing the time within

which the appearance must be made, is essential. Such notification is usually given by monition, public proclamation or publication in some other form. The manner of notification is immaterial, but the notification itself is indispensable.

"In *Woodruff v. Taylor*, 20 Vt., 65, the subject of proceedings *in rem* in our courts is elaborately considered by the Supreme Court of Vermont. After stating that in such cases notice is given to the whole world, but that from its nature it is to the greater part of the world constructive only, and mentioning the manner in which such notice is given in cases of seizure for violation of the revenue laws, by publication of the substance of the libel with the order of the court thereon specifying the time and place of trial, and by proclamation for all persons interested to appear and contest the forfeiture claimed, the court observed, that in every court and in all countries where judgments were respected, notice of some kind was given, and that it was just as material to the validity of a judgment *in rem* that constructive notice at least should appear to have been given as that actual notice shall appear upon the record of a judgment *in personam*. "A proceeding," continued the court, "professing to determine the right of property, where no notice, written or constructive, is given, whatever else it might be called, would not be entitled to be dignified with the name of a judicial proceeding. It would be a mere arbitrary edict, not to be regarded anywhere as the judgment of a court." * * * The doctrine invoked by counsel, that, where

a court has once acquired jurisdiction, it has a right to decide every question which arises in the cause, and its judgment, however erroneous, cannot be collaterally assailed, is undoubtedly correct as a general proposition, but, like all general propositions, is subject to many qualifications in its application. All courts, even the highest, are more or less limited in their jurisdiction; they are limited to particular classes of actions, such as civil or criminal; or to particular modes of administering relief, such as legal or equitable; or to transactions of a special character, such as arise on navigable waters, or relate to the testamentary disposition of estates; or to the use of particular process in the enforcement of their judgments."

We quote also from *Guaranty Trust Co. v. Green Cove Railroad*, 139 U. S., 146:

"It is claimed, however, that as the proceeding to foreclose this deed was *in rem*, the seizure of the property proceeded against was the foundation of the jurisdiction of the court, and that a defective publication of notice, though it might reverse a judgment in such a case for error in departing from the directions of the statute, does not render such a judgment, or the subsequent proceedings, void; and the case of *Cooper v. Reynolds*, 10 Wall., 308, is relied upon in support of this position. * * * The case of *Cooper v. Reynolds* was one where the property was seized by virtue of an attachment taken out at the commencement of the suit in which the proceedings to call in the non-resident defendant were had,

and the record asserted that "publication has been made according to law." Indeed, Mr. Justice Miller said in that case, p. 319, "We do not deny that there are cases * * * in which the legislature has properly made the jurisdiction to depend on this publication of notice, or on bringing the suit to the notice of the party in some other mode, when he is not within the territorial jurisdiction." It was said by Mr. Justice Wayne, in *Williamson v. Berry*, 8 How., 495, 540, in reply to an argument that a decree in chancery could not be looked into in a collateral way, that "it is an equally well-settled rule in jurisprudence, that the jurisdiction of any court exercising authority over a subject may be inquired into in every other court, when the proceedings in the former are relied upon, and brought before the latter, by a party claiming the benefit of such proceedings. The rule prevails whether the decree of judgment has been given in a court of admiralty, chancery, ecclesiastical court or court of common law." The decisions of this court upon this subject, beginning in the year 1794 with the case of *The Betsey*, 3 Dall., 6, have been uniform and consistent. The following are a few of the leading cases upon this subject: *Rose v. Himely*, 4 Cranch, 241; *Elliott v. Piersol*, 1 Pet., 328; *Wilcox v. Jackson*, 13 Pet., 498; *Shriver's Lessee v. Lynn*, 2 How., 43; *Lessee of Hickey v. Stewart*, 3 How., 750; *Webster v. Reid*, 11 How., 437. In the last case it was held that where jurisdiction had been sought to be obtained by publication, as in this case, it was necessary to show that notice had been given by pub-

lication as the act required. "If jurisdiction," says, essential to show that all its requisites had been substantially observed. It was necessary for the plaintiff to prove notice, and negative proof that the notice was not given, under such circumstances, could not be rejected." In *Hunt v. Wickliffe*, 2 Pet., 201, an order was made by a state court of chancery for a non-resident to appear, and that a copy be published "for eight weeks in succession agreeably to law," and it was held that, as the laws of Kentucky only authorized their courts of chancery to make decrees against absent defendants on the publication of an order for two months successively, the order of the court of chancery for a publication for eight weeks was not a compliance with the law, the supreme court of Kentucky having decided that the publication must be continued for two calendar months. Under this construction of the act, the decree was made against persons who were not parties to the suit, and it was held that it could not affect them. So in *Galpin v. Page*, 18 Wall., 350, it was held that when by legislation of a State constructive service of process by publication is substituted in place of personal service, the statutory provision must be strictly pursued in order to bind a claim of another state not personally served. "Whenever," says Mr. Justice Field, "it appears from the inspection of the record of a court of general jurisdiction that the defendant, against whom a personal judgment or decree is rendered, was at the time of the alleged service without the territorial limits of the court, and thus beyond the reach

of its process, and that he never appeared in the action, the presumption of jurisdiction over his person ceases, and the burden of establishing the jurisdiction is cast upon the party who invokes the benefit or protection of the judgment or decree. * * * When, therefore, by legislation of a state, constructive service of process by publication is submitted in place of personal citation, * * * every principle of justice exacts a strict and liberal compliance with the statutory provisions." pp. 368, 369. Later cases to the same effect are *Earle v. McVeigh*, 91 U. S., 503; *Settlemier v. Sullivan*, 97 U. S., 444; *Cheeley v. Clayton*, 110 U. S., 701; *Applegate v. Lexington &c. Mining Co.*, 117 U. S., 255; and there is scarcely a state in the Union in which the same principle has not been announced and reaffirmed."

It is clear that the question whether the Federal court shall entertain a suit to quiet title which may involve the validity of the judgment of a State court (assuming the *situs* of the property and citizenship of the parties to be proper) is not in any sense a jurisdictional one, save as the existence of a plain remedy at law may in a particular instance influence the Court to refuse to act. To a certain extent it is perhaps a question of comity. As much is indicated by the extract from Mr. Street's work on Equity Practice, given on page 18 of appellant's brief. It is said in *Mast v. Stover Mfg. Co.*, 177 U. S., 488, that "comity is not a rule of law, but one of practice, convenience and expediency. * * * Its obligation is not imperative."

We do not believe there is any question of comity here. There is no suggestion of a remedy in the state court which ought to supplant the right of the plaintiff to resort to equity. Even if there were a remedy at law, or some remedy in the state court, the appellant has waived any right to raise this point.

Provided the matter is in the general scope of equity jurisdiction, an objection that an action should have been brought at law instead of in equity is waived by a failure to take advantage of it at the proper time, and if the defendant in a suit in equity answers and submits to the jurisdiction of the court, it is too late for him to object that the plaintiff has a plain and adequate remedy at law.

Beyer v. LeFevre, 186 U. S., 114; 22 S. Ct., 767.

Perego v. Dodge, 163 U. S., 160-164.

Insley v. United States, 150 U. S., 512.

Brown v. Lake Superior Iron Co., 134 U. S., 530.

Reynes v. Dumont, 130 U. S., 354, 395.

Toledo Computing Scale Co. v. Comp. Scale Co.,
142 Fed., 923.

Green v. Turner, 98 Fed., 756.

Security Co. v. Baker County, 33 Or., 338; 54
Pac., 174.

In *Security Co. v. Baker County*, 33 Or., 338, in which the opinion was delivered by Mr. Justice Wolverton, it is said:

"A question was made at the argument, and is somewhat insisted upon in the brief, that a court of equity is without jurisdiction to entertain the cause of suit set forth by the complaint, because plaintiff has an adequate remedy at law; but the defendants have themselves, by their answer, sought and demanded equitable relief, which precludes them from raising the question." *Kitcherside v. Meyers*, 10 Ore., 21; *O'Hara v. Parker*, 27 Ore., 156. (39 Pac., 1004).

By answering to the merits, and *a fortiori* by filing a cross-bill submitting his title to the jurisdiction of the court and praying for affirmative relief, the appellant has waived any possible objection he might otherwise have urged against the action of the court in taking jurisdiction of the cause. It has frequently and uniformly been so held, where the citizenship of the parties was such that the Federal court would not have had jurisdiction but for such waiver.

Central Tr. Co. v. McGeorge, 151 U. S., 129, 132; 14 S. Ct., 286.

Ex Parte Schollenberger, 96 U. S., 369, 378.

St. Louis Ry. v. McBride, 141 U. S., 127.

Texas & Pac. Ry. Co. v. Saunders, 151 U. S., 105.

Western Loan v. Butte, 210 U. S., 368; 28 S. Ct., 720, 721.

Gregory v. Pike, 67 Fed., 837.

Barnes v. Western Union, 120 Fed., 550, 555.

Baltimore & Ohio R. R. v. Doty, 133 Fed., 866.

Wolff & Co. v. Choctaw Ry. Co., 133 Fed., 601.

Dalles v. Crippen Mfg. Co., 156 Fed., 706, 708.

Texas Co. v. Central Fuel Oil Co., 194 Fed., 1.

Respecting the claim that defendant in some way occupies the position of a *bona fide* purchaser, we think it may be sufficient to say, if anything needs to be said, that no defense of this character is pleaded. The rule is settled that a defendant who would avail himself of the defense of *bona fide* purchase must allege and prove the facts constituting such defense. The leading case on the subject is Boone v. Childs, 10 Peters, 177, in which the essentials of such a plea are set forth. See also Daniels' Chancery Pleading & Practice, 4 Am. Ed., Sections 671, 672.

The Oregon cases on the point are numerous, the one most often quoted being Hyland v. Hyland, 19 Ore., 51.

In Jennings v. Lentz, 50 Ore., 483, it is held that one cannot be a *bona fide* purchaser under an attachment, where the apparent title was not in the defendant at the time of the attachment.

We were also met with the contention in the lower court, which may possibly be renewed at the oral argument, that the courts should not take jurisdiction because the plaintiff had a remedy at law by action in ejectment under Sections 326 and 327, Lord's Oregon Laws.

Your Honors are so familiar with the rule and the practice of the Oregon courts under the statute in question that no argument is needed. A reference to some of the reported cases may be convenient:

Morrison v. Holladay, 27 Ore., 175.

McLeod v. Lloyd, 43 Ore., 260.

SUFFICIENCY OF THE AFFIDAVITS.

In view of our array of authorities on the subject, against which no showing whatever is made, the appellant can scarcely contend that the so-called affidavit taken outside of the state is anything but a nullity. However, it is claimed that the affidavits of Coshow and Evelyn Johnson are sufficient. We say these affidavits have no tendency to prove at all the absolutely essential facts that the defendants could not, with due diligence, have been found in the State of Oregon, or that they had property therein. We have set them out in full at page ~~4~~ and page ~~5~~ of this brief.

If these affidavits tended to prove said jurisdictional facts, we admit that they would be sufficient in collateral proceedings, as is held in *George v. Nowlan*, 38 Ore., 537; 64 Pac., 1; and in *Marx v. Ebner*. The affidavit of Evelyn Johnson, shown at page 93 of the printed transcript, is merely an affidavit of mailing copies of summons and complaint to the defendants, at given addresses, without stating that these addresses are the addresses of the defendants, or that either of them was, or within the past twenty years had been there. The first affidavit of Mr. Coshow, shown at page 83 of the

printed transcript, refers only to an inquiry he has made, from a party outside the State of Oregon, who has inquired of still other parties outside the State of Oregon, as to the postoffice address of the defendants, without a word of reference to diligence to find the defendants in the State of Oregon. It does not state even as a conclusion of law, or by any inference, that any attempt had been made to find the defendants in the State of Oregon.

The second affidavit of Mr. Coshow, shown at page 92 of the printed transcript, refers to the same thing—inquiries outside the State of Oregon as to the postoffice address of the defendants; not a word as to whether they were to be found in the State of Oregon, nor as to diligence to ascertain this fact.

The Sheriff's return, "Not Found," refers to his county only and is not carried into any of the affidavits, by reference or otherwise, and it is to be borne in mind that the requisite showing can be made by affidavit only.

The law of Oregon has stood for 25 years as it is laid down in *Pike v. Kennedy*, 15 Ore., 425; 15 Pac., 637; *McDonald v. Cooper*, 32 Fed., 745. We quote from the latter:

"That diligence has been used to find the defendant within the state must appear from the affidavit, and a mere statement or assertion therein that the party is a non-resident thereof is not sufficient. Nor is such statement or assertion that diligence has been used, a compliance with the statute. The affidavit must contain some evidence of the ultimate fact, be-

sides the assertion of the affiant, on which the judicial mind may act in granting the order. And however slight and inconclusive this evidence may be, if it had a legal tendency to prove the diligence, and that the defendant could not be found in the state, it is sufficient to give the court jurisdiction, and sustain the order against a collateral attack. But where there is no evidence of such diligence except the bald assertion of the fact, or that of non-residence, the order is void, and the Court does not acquire jurisdiction. *Rickertson v. Richardson*, 26 Cal., 153; *Forbes v. Hyde*, 31 Cal., 350; *Carleton v. Carleton*, 85 N. Y., 314; *Neff v. Pennoyer*, 3 Sawy., 288.

This was a case of collateral attack, and the judgment was held void.

Your Honors recently had the same question before you in the case of *Cohen v. Portland Lodge No. 142*, reported in 152 Fed., 357, in which the following language is used:

"We proceed, therefore, to ascertain what the affidavit must contain, and then whether upon its face it shows a want of jurisdiction in the court that rendered the decree. The statute requires that both non-residence and absence must exist and both must appear to the satisfaction of the court before the court can grant an order that service shall be made by publication; and there must always be a showing by affidavit that due diligence has been used to find the defendant within the state. So we have three matters material to the ultimate point involved in our

inquiry, each of which must have been made to appear to the state court before the order could have been proper. First, it must have appeared that diligence had been used to find the defendant in the state; second, it must have appeared that defendant could not be found within the state after a diligent search; and, third, it must have appeared that defendant was not a resident of the state when the order was applied for. The purpose of the statute, requiring a diligent search as a prerequisite to the consideration of the matter of absence and non-residence, is obviously to allow no departure from the ordinary methods of service upon the person by delivery of process as prescribed, unless absence and non-residence make a substitute service permissible."

It is just as requisite that the affidavit shall show that "the defendant has property within the state" as it is to show "that he cannot after due diligence be found." *L. O. L.*, 856; *Colburn v. Barrett*, 21 Ore., 27; *McDonald v. Cooper*, 37 Fed., 750.

We quote from the Oregon case just cited (p. 29):

"The result is, that the affidavit nowhere discloses that the defendants have any property in this state. There is not even a bare assertion to that effect, nor is the property specified. No principle is better settled than that the requirements of the statute in cases of this sort must be complied with when service by publication is sought to be had on absent defendants. 'When,' said Mr. Justice Field, 'constructive service of process by publication is substi-

tuted in place of personal citation, and the court upon such service is authorized to proceed against the person of an absent defendant not a citizen of the state, nor found within it, every principle of justice exacts a strict and literal compliance with the statutory provisions.' (Galpin v. Page, 18 Wall., 350). The affidavit is certainly fatally defective in the particulars noted, and the order based upon it cannot be sustained. It results, then, that the court did not acquire jurisdiction of the appellants, and that its judgment or decree as against them is void."

In Howard v. DeCordova, 177 U. S., 614; 20 S. C. R., 819, it is said, in a case of collateral attack on the judgment of a state court, that:

"The controversy turned on whether Newell could be heard in the Circuit Court of the United States to attack the judgment of the State court, it being contended that the fact that Newell was represented by an attorney at law who presented and filed an answer in his name was conclusively established by the judgment, which could not be assailed collaterally in the court of the United States, however much it might be subject to direct attack for fraud in the courts of the State of Texas. The contention was not maintained, it being decided that, as the charges went to the jurisdiction of the state court, such question of jurisdiction could be examined in the courts of the United States whenever the judgment of the state court was presented as a muniment of title. * * * The affidavit by the plaintiff or his attorney as to the want of knowledge of the

names of the parties defendant, or their residences, is made an essential prerequisite of the jurisdiction of the court to issue an order for publication. In other words, a summons by publication could only take place when the essential affidavit is previously made. In the state court, therefore, the affidavit was jurisdictional in its character."

The vice of appellant's argument lies in the refusal to recognize a difference between informalities and defects in the affidavit, and a total lack of any showing on some vital point. He therefore cites a mass of cases holding that judgments will not be set aside on collateral attack for such informalities, — a proposition that we would have conceded to him without argument, — and because the necessity of his case requires it, he ignores that equally abundant line of authorities holding that where there is a total lack of such showing respecting some vital point required to be shown in the affidavit, the court is without jurisdiction to proceed.

On page 42 of his brief appellant implies that the Oregon Court may have had before it other evidence than the record now shows as the basis for the order of publication. The record is certified by the Clerk and stipulated by the parties to be complete. See page 68 of the printed transcript. Nor will presumptions of this character be indulged, as is shown by authorities we have cited in that respect.

Appellant is mightily mistaken in the assumption expressed in his brief at page 45, that it is conceded that if the affidavit was correct in all essential points

the title of the property is in him. We are contesting the case as earnestly on the lack of a valid attachment, as on the lack of a proper affidavit.

The theory that the appellant, by his attachment made April 1, acquired a lien on the title which eleven days afterward vested in Aaron momentarily, and the way in which this theory is reasoned out, is ingenious and amusing. It is to be noted in the first place that the Sheriff never made any attachment on the land. Section 300 L. O. L. directs how an attachment shall be made. The material part is as follows:

“1. Real property shall be attached as follows: The Sheriff shall make a certificate containing the title of the cause, the names of the parties to the action, a description of such real property, and a statement that the same has been attached at the suit of the plaintiff; and deliver the same to the county clerk of the county in which the attached real estate is situated.”

It will be noted that the appellant attempted to attach, not the land, but the interest of the defendant therein. (See Sheriff's return of the writ, at page 75 of the printed transcript). The defendants on that day had no interest in the land and the attachment caught nothing. That it was like a bear-trap standing set, ready to grab any interest that might in the future vest in the defendants, will hardly be accepted as a valid proposition of law.

The theory that the attaching creditor occupies a position as favorable with respect to the acquisition of

an after vesting title as that of a purchaser in a bargain and sale deed, is absurd. Such deeds have the effect of passing the after-acquired title on the basis of estoppel against the grantor because he has therein affirmed himself, by the execution of the deed, to be seized of the land. Such an element of estoppel is totally lacking here.

In closing, we ask the Court to note that many cases cited by appellant show that the Federal courts do assume jurisdiction of cases brought to set aside on collateral attack titles resting on judgments of the state courts, and that, too, notwithstanding jurisdiction of the *res*; so that appellant's two main points go down before his own authorities. In addition to those which appellant cites, every one of the following is a case where such jurisdiction was assumed, and the list ought to be a full answer to appellant's contention respecting *Cooper v. Reynolds*:

Thatcher v. Powell, 6 Wheaton, 119.

Pennoyer v. Neff, 95 U. S., 714.

Newman v. Crows, 60 Fed., 220.

Settlemier v. Sullivan, 97 U. S., 444.

Guaranty Trust Co. v. Green Cove R. Co., 139 U. S., 137.

Earle v. McVeigh, 91 U. S., 503.

Cheely v. Clayton, 110 U. S., 701.

Ritchie v. Sayers, 100 Fed., 520.

Meyer v. Kuhn, 65 Fed., 705.

Phoenix Bridge Co. v. Castleberry, 131 Fed., 179.

Simon v. Southern Ry. Co., 195 Fed., 56.

Swift v. Meyers, 37 Fed., 36.

Cissell v. Pulaski, 10 Fed., 891.

Hatch v. Ferguson, 57 Fed., 970.

A suit to foreclose a lien or remove a cloud is just as much a suit *in rem* as is an attachment suit. This is fully gone into in Arndt v. Griggs, 134 U. S., 316, and the cases there cited. Therefore the decision in Meyer v. Kuhn, 65 Fed., 705 is in point. The court had jurisdiction of the *res* and yet the decree was held void for a defect in the publication of summons. The point decided in Arndt v. Griggs, namely, that a suit to foreclose a lien is just as much a proceeding *in rem* as is an attachment, is what makes, as it seems to us, the decision in Guaranty Trust Company v. Green Cove R. Co., 139 U. S., 137, precisely in point and decisive of the case at bar.

Respectfully submitted,

JAMES N. DAVIS,

VEAZIE & VEAZIE,

Solicitors for Respondents.

No. 2234

IN THE

UNITED STATES CIRCUIT COURT
OF APPEALS

FOR THE NINTH CIRCUIT

UNITED STATES OF AMERICA, PLAINTIFF IN
ERROR,

VS.

PORTNEUF-MARSH VALLEY IRRIGATION COM-
PANY, A CORPORATION, DEFENDANTS
IN ERROR.

BRIEF OF PLAINTIFF IN ERROR.

ERROR TO THE UNITED STATES CIRCUIT COURT, DISTRICT
OF IDAHO.

JAMES L. McCLEAR,

United States Attorney for the District of Idaho.

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BRIEF OF PLAINTIFF IN ERROR.

STATEMENT OF FACTS.

This cause reaches this Court by writ of error presented by the United States. The lower court rendered judgment in favor of the defendants on demurrer to the complaint. The Government refused to further plead, and advances as error three different grounds, all of which go to the question of law as to whether or not the complaint states facts sufficient to constitute a cause of action.

The action was brought to recover from the defendants

\$2461.30, the alleged value of 246.13 acres of land within the Fort Hall Indian Reservation in Idaho, appropriated by the defendant company in constructing an irrigation system for the irrigation of certain lands near the reservation.

On June 28th, 1908, the irrigation company made application to the Secretary of the Interior for a permit for such purposes which was thereafter duly approved by the Secretary in the usual manner in which such licenses are granted.

There is shown upon the face of the complaint the approval of the Secretary of the Interior, and that the company has constructed a reservoir and has impounded therein a large body of water to be used as stated in the irrigation of certain arid lands near the Fort Hall Indian Reservation, belonging to private parties.

The defendant in error, hereafter designated as the irrigation company, contends that it had the right to construct the reservoir, under authority granted by the Secretary of the Interior, pursuant to Act of Congress of March 3d, 1891, granting right of way for canals and reservoirs (Sec. 18 Act of March 3d, 1891, 26 Stat. 1101, 6 Fed. Stat. Annotated 508; Sec. 19 Act of March 3d, 1891, 26 Stat. 1102, 6 Fed. Stat. Annotated 509). The action was brought upon the theory that the Secretary of the Interior is without authority to grant such permit across the lands belonging to the Indians by virtue of a treaty hereinafter referred to, unless Congress by express statute has so authorized, and that the Act of March 3, 1891, does not bear out such construction, and that the acts of the irrigation company are without the sanction of law and the company should respond in damages for the reasonable value of the lands taken.

The Government maintains that the language used in the Act of March 3d, 1891, in Sec. 18 thereof, "that the right of way through the public lands and reservations of the

United States, is hereby granted" does not give the right of way for the purposes contended by the irrigation company across the Fort Hall Indian Reservation.

BRIEF, POINTS AND AUTHORITIES.

I.

That the Act of March 3d, 1891, has been superseded by a later act which by necessary implication repeals the Act of March 3d, 1891.

II.

That the lands in question were segregated and taken out of the category of public lands by grant and treaty of agreements with the Bannock and Shoshone Indians concluded on the 3d day of July, 1868 (Vol. 15 Stat. L. 673).

III.

Even though the Secretary had authority to grant the right of way under Act of March 3d, 1891, compensation should be allowed the Indians for the lands appropriated.

These propositions may be considered in the order named.

Proposition 1.

The repealing statute referred to was enacted by Congress May 11th, 1898, and is as follows:

BE IT ENACTED BY THE SENATE AND HOUSE OF REPRESENTATIVES OF THE UNITED STATES OF AMERICA IN CONGRESS ASSEMBLED, That the Act entitled "An Act to permit the use of the right of way through the public lands for tram-roads, canals, and reservoirs, and for other purposes," approved January twenty-first, eighteen hundred and ninety-five, be, and the same is hereby, amended by adding thereto the following:

"That the Secretary of the Interior be, and hereby is, authorized and empowered, under general regulations

to be fixed by him, to permit the use of right of way upon the public lands of the United States, not within limits of any park, forest, military, or Indian reservations, for tramways, canals, or reservoirs, to the extent of the ground occupied by the water of the canals and reservoirs, and fifty feet on each side of the center line of the tramroad, by any citizen, or association of citizens, of the United States, for the purposes of furnishing water for domestic, public, and other beneficial uses.

"Sec. 2. That the rights of way for ditches, canals, or reservoirs heretofore or hereafter approved under the provisions of sections eighteen, nineteen, twenty, and twenty-one of the Act entitled 'An Act to repeal timber culture laws, and for other purposes,' approved March third, eighteen hundred and ninety-one, may be used for purposes of a public nature; and said rights of way may be used for purposes of water transportation, for domestic purposes, or for the development of power, as subsidiary to the main purpose of irrigation."

It will be observed that under the provisions of Section 2 of the Act of May 11th, 1898, reference is made to rights of way for canals or reservoirs for purposes of public nature, and said rights of way may be used for water transportation for domestic purposes or for the development of power as subsidiary to the main purpose of irrigation, and does not confer upon a private irrigation company, such as is now before the Court, the right of way across an Indian reservation, even with the approval of the Secretary of the Interior. Section 1 of the Act of May 11th, 1898, expressly states that the Secretary of the Interior is precluded from granting right of way within the limits of any park, forest, military or Indian reservation for canals, tramways or reservoirs. It is also noted that Sections 18, 19, 20 and 21 are from the Act of March 3, 1891: "An Act to repeal timber culture laws, and for other purposes," which Act is referred to in Section 2 of the Act of May 11, 1898.

It was contended by the defendant in the lower court that the Act of February 15, 1901 (37 Stat. 790), which grants the right of way over public lands, reservations and public parks for electric lines, canals, tunnels, etc., is explanatory of the word "reservations" used in the Act of March 3, 1891. The proviso under Act of February 15, 1901, clearly refutes any such interpretation and uncontrovertably shows that the permission granted by the Secretary therein to be of a temporary character and revocable at will, and which proviso is as follows:

"And provided further: That any permission given by the Secretary of the Interior under the provisions of this Act may be revoked by him or his successor at his direction, and shall not be held to confer any right or easement or interest in, to or over any public land, reservation or park."

It is also significant that the Act of March 3, 1875, which gives the right of way through public lands to railroads, that Section 5 thereof especially exempts Indian reservations from the grant, namely: "That this Act shall not apply to any lands within the limits of any military park or Indian reservation, or other lands especially reserved from sale unless such right of way shall be provided for by treaty, stipulation, or by Act of Congress heretofore passed" (18 Stat. 483).

Proposition 2.

The treaty between the United States and the Bannock and Shoshone tribes of Indians, concluded on July 3, 1868, expressly confers upon said Indians the right to the absolute and undisturbed use and occupation of the lands included within the said reservation, and for other free tribes or individual Indians as from time to time they may be willing, with the consent of the United States, to admit amongst them, and the United States solemnly agrees that no persons

except those therein designated and authorized therein to do so, and except such officers, agents and employes of the government as may be authorized to enter upon the Indian reservation in discharge of the duties enjoined by law, shall ever be permitted to pass over, settle upon, or reside in the territory described in this article (being Article No. 2 of said treaty) for the use of said Indians, and henceforth, they will and do hereby relinquish all titles, claims or rights in and to any portion of the territory of the United States except such as is embraced within the limits aforesaid.

Article 6 of said treaty gives the right to any individual belonging to said tribes of Indians, the right to select 320 acres of land within the reservation of his tribe, which tract so selected, certified and recorded in the land book, shall cease to be held in common, but the same may be occupied and held to the exclusive possession of him or his family so long as he or his family may continue to cultivate it.

Article 6. "If any individual belonging to said tribes of Indians, or legally incorporated with them, being the head of a family, shall desire to commence farming, he shall have the privilege to select, in the presence and with the assistance of the agent then in charge, a tract of land within the reservation of his tribe, not exceeding three hundred and twenty acres in extent, which tract so selected, certified and recorded in the 'land-book,' as herein directed, shall cease to be held in common, but the same may be occupied and held in the exclusive possession of the person selecting it, and of his family, so long as he or they may continue to cultivate it. Any person over eighteen years of age, not being the head of a family, may in like manner select and cause to be certified to him or her, for purposes of cultivation, a quantity of land not exceeding eighty acres in extent, and thereupon be entitled to the exclusive possession of the same as above described. For each tract of land so selected a certificate, containing a description thereof, and the name of

the person selecting it, with a certificate endorsed thereon that the same has been recorded, shall be delivered to the party entitled to it by the agent, after the same shall have been recorded by him in a book to be kept in his office subject to inspection, which said book shall be known as the 'Shoshone (eastern band) and Bannock land-book.' "

The President may at any time order a survey of these reservations, and when so surveyed Congress shall provide for protecting the rights of the Indian settlers in these improvements, and may fix the character of the title held by each. The United States may pass such laws on the subject of alienation and the descent of property as between Indians, and on all subjects connected with the government of the Indians on said reservations, and the internal police thereof, as may be thought proper."

Article 11. "No treaty for the cession of any portion of the reservations herein described which may be held in common shall be of any force or validity as against the said Indians, unless executed and signed by at least a majority of all the male Indians occupying or interested in the same; and no cession by the tribe shall be understood or construed in such manner as to deprive without his consent, any individual member of the tribe of his right to any tract of land selected by him, as provided in Article 6 of this treaty."

It is conceded that the Secretary of the Interior is the custodian of the public lands, but, when withdrawn from entry and sale as are lands within an Indian reservation, and reserved to the exclusive use and benefit of the Indians for lands ceded to the Government, the Secretary can then only dispose of said lands as Congress may direct. That the Secretary of the Interior is merely an agent appointed by law to do certain acts and perform certain duties required by law and he has no power beyond those specified in the law which creates his office and defines his powers and duties. The treaty with the Fort Hall Indians gives them a vested right

in the lands so reserved, and any attempted transfer of any part of the lands secured by treaty, would be a gross breach of public faith, and the presumption is that Congress never intended to deprive them of the lands solemnly conveyed by treaty rights.

Leavenworth Railroad Company v. United States,
92 U. S. 733; 23 L. Ed. 634.

The Court's attention is especially directed to the use of the language in the granting clause "That the right of way through the public lands and reservations of the United States is hereby granted, etc." It is noted that the reservations mentioned are in the possessive; that is, relate to reservations which belong to the United States such as military and park reservations, where the absolute and incontestable title remains in the United States, and was not intended by Congress to refer to lands held in trust by the United States for the Indians. Such an interpretation would be a breach of public faith towards a dependent and unlettered people to take from them their lands after a solemn and binding treaty agreement made long prior to the passage of the act in question. It is incongruous to say that an official of the land department can take from the grant 246.13 acres for the use of a private corporation to irrigate lands outside the limits of the reservation. If this reasoning is sound, the power and authority rests with the Secretary of the Interior to diminish the acreage of the reserve to such an extent as to defeat the purpose of the grant, and thus deprive each individual belonging to said tribes being the head of a family from selecting a tract within the reservation of his tribe not exceeding 320 acres in extent as provided in Article 6 of the treaty.

This court gave emphasis to the importance of the principles thus enumerated in the following pertinent language:

In the case of *Winters vs. United States*, 143 Fed. 748,

after quoting from Kinney on Irrigation, Section 124, the Courts say: "In the application of these principles to military reservations, see *Wilcox v. Jackson*, 13 Pet. 498, 513, 10 L. Ed. 264. In *Leavenworth R. R. Co. v. United States*, 92 U. S. 733, 742, 745, 747, 23 L. Ed. 634, the court, in discussing the question whether certain lands granted to the railroad company conveyed lands which had previously been reserved for the Indians, said:

"As long ago as the *Cherokee Nation v. Georgia*, 5 Pet. 1, 8 L. Ed. 25, this court said that the Indians are acknowledged to have the unquestionable right to the lands they occupy, until it shall be extinguished by a voluntary cession to the government; and recently, in *United States v. Cook*, 19 Wall. 591, 22 L. Ed. 210, that right was declared to be as sacred as the title of the United States to the fee. * * * With the ultimate fee vested in the United States, coupled with the exclusive privilege of buying that right, the Indians were safe against intrusion, if the government discharged its duty to them. * * * We are not without authority that the general words of this grant do not include an Indian reservation."

After quoting from *Wilcox v. Jackson*, *supra*, the court said that the rule therein announced "Applies with more force to Indian than to military reservations. The latter are the absolute property of the government. In the former other rights are vested. Congress cannot be supposed to grant them by a subsequent law general in its terms. Specific language, leaving no room for doubt as to the legislative will, is required for such a purpose. * * * The treaty reserved them as much to one as to the other of the contracting parties. Both were interested therein and had title thereto. In one sense they were reserved to the Indians; but, in another and broader sense, to the United States, for the use of the Indians. Every tract set apart for special uses is reserved to the government, to enable it to enforce them." In *United States v. Carpenter*, 111 U.S. 347, 349, 4 Sup. Ct. 435, 436, 28 L. Ed. 451, where the court held that the location of land scrip upon lands reserved for

Indians under the provisions of a treaty with an Indian tribe, and the issue of a patent therefor, are void, Mr. Justice Field, in delivering the opinion of the court, said:

"It matters not whether the land had been surveyed or not, the treaty was notice that a part of the quarry would be retained by the government, and that the whole might be, for the use of the Indians. This purpose and the stipulation of the United States could not be defeated by the action of any officers of the Land Department."

In *Missouri, etc. Ry. Co. v. Roberts*, 152 U. S. 114, 118, 14 Sup. Ct. 496, 498, 38 L. Ed. 377, the court, in discussing the general question, said: "It has always been held that the occupancy of land set apart by statute or treaty with them (the Indians) for their use cannot be disturbed by claimants under other grants of the government not indicating its intention, either in express terms or by the uses to which the lands are to be applied, to change the possession of the lands. And the setting apart by statute or treaty with them of lands for their occupancy is held to be of itself a withdrawal of their character as public lands."

Where public lands were withdrawn from sale for the subsequent benefit of certain Indians the fact that the withdrawal was conditional upon the land being required for the purposes of the Indian treaty, and that the Indians were to have no rights in such lands until after legislation should invest them with legal title, did not destroy the effectiveness of the withdrawal.

United States vs. Grand Rapids & I. R. Co., 154 Fed. 136.

"The reservation clause employed in the grant in question has been attached to all railroad land grants since 1850. The words 'public lands' have been held to designate such land as is subject to sale or other disposition under the general laws, but not such as is reserved by competent author-

ity, for any purpose or in any manner, although no exception is made of it. *Leavenworth, etc., R. R. Co. v. United States*, 92 U. S. 733, 746, 749, 23 L. Ed. 634; *Williams v. Baker*, 17 Wall 144, 21 L. Ed. 561; *Newhall v. Sanger*, 92 U. S. 761, 763, 23 L. Ed. 769; *No. Pacific R. R. Co. v. Musser-Sauntry Co.*, 168 U. S. 609, 18 Sup. Ct. 205, 42 L. Ed. 596; *United States v. So. Pacific R. Co.*, 146 U. S. 570, 13 Sup. Ct. 152, 36 L. Ed. 1091; *Northern Lumber Co. v. O'Brien*, 139 Fed. 614, 71 C. C. A. 598; *Id.*, 27 Sup. Ct. 249, 204 U. S. 190, 51 L. Ed. 438.

The provision in the granting act for indemnity in lieu of lands sold or pre-empted does not indicate an intention to grant any but public lands. *Leavenworth, etc. R. R. Co. v. United States*, *supra*. The fact that the withdrawal was conditional upon the land being required for the purposes of the treaty, and that the Indians were to have no rights in them until after legislation should invest them with the legal title, does not destroy the effectiveness of the withdrawal. *Wolcott v. Des Moines Co.*, 5 Wall. 681, 18 L. Ed. 689; *Wolsey v. Chapman*, 101 U. S. 755, 25 L. Ed. 915; *Williams v. Baker*, 17 Wall. 144, 21 L. Ed. 561; *Homestead Co. v. Valley R. R.*, 17 Wall. 153, 21 L. Ed. 622; *Wisconsin Central R. R. v. Forsythe*, *supra*; *Spencer v. McDougal*, *supra*; *No. Pacific R. R. Co. v. Musser-Sauntry Co.*, *supra*.

The construction put upon the grant by the Land Department, as not excepting lands reserved for Indian purposes, cannot legally prevail against a clearly correct legal interpretation. *Wilcox v. McConnell*, 13 Pet. 511, 10 L. Ed. 264; *Wisconsin Central R. R. Co. v. Forsythe*, 159 U. S. 46, 61, 15 Sup. Ct. 1020, 40 L. Ed. 71, and cases there cited. If the views above expressed are correct, it results that the lands in question were in contemplation of law reserved from the grant of June 3, 1856, and did not legally pass thereunder."

If withdrawn lands do not apply to railroad grants, then there is a much more cogent reason that Indian reservations are not included within the Act of March 3, 1891. *Leavenworth L. & G. R. Co. v. United States*, 92 U. S. 733, 23 L. Ed. 634; *Barton v. No. Pacific R. R. Co.* 145 U. S. 535, 36 L. Ed. 806; *No. Lumber Co. v. O'Brien*, 204 U. S. 190, 51 L. Ed. 438; *Minnesota v. Hitchcock*, 185 U. S. 373, 46 L. Ed. 954; *U. S. v. Oregon Central Military Road Co.* 103 Fed. 554; *Buttz v. No. Pacific R. R. Co.* 119 U. S. 55, 30 L. Ed. 330; *Mount Nebo Reservation*, 13 L. D. 45; *No. Pacific R. R. Co. v. Maclay*, 26 L. D. 43.

We go further and say that whenever a tract of land shall have been once legally appropriated to any person, from that moment land thus appropriated becomes severed from the mass of the public lands, and that no subsequent law, proclamation or sale could be construed to embrace or operate upon it although no reservation were made of it. It applies with more force to Indian than to the military reservations. The latter are the absolute property of the Government. In Indian reservations other rights are vested. Congress cannot be supposed to grant them by subsequent law general in its terms. Specific language leaving no room for doubt as to legislative will is required for such a purpose. That land dedicated to the use of the Indians should, upon every principle of natural rights be carefully guarded by the Government and saved from a possible grant, is a principle which will command universal assent.

Leavenworth R. R. Co. vs. United States, 92 U. S. 723, 23 L. Ed. 634.

It is not deemed that Section 13 of the Act of June 25, 1910, militates against the position taken by the Government, as the authority therein given is to reserve from location, entry, sale, allotment or other appropriations any lands within any Indian reservation valuable for power or reser-

voir sites, or which may be necessary for use in connection with any irrigation project heretofore or hereafter to be authorized by Congress, etc." This section confers upon the Secretary of the Interior, in his discretion, a right to reserve lands within Indian Reservations for irrigation companies recognized by Congress, but makes no mention of authority to grant rights of way for ditches and canals as provided under the Act of March 3, 1891, for its purposes are different in the respects enumerated.

It is noted that application for right of way in the instant case was approved by the Secretary of the Interior June 27th, 1908, and therefore the Act of June 25, 1910, above referred to would not be germane as the power thus conferred upon the Secretary is subsequent to the appropriation of the land by the irrigation company.

A treaty is the highest form of law and its provisions should not be abrogated unless Congress in its wisdom has deemed it expedient for the public good to do so. *United States v. Carpenter*, 111 U. S. 347, 28 L. Ed. 451; *Spalding v. Chandler*, 116 U. S. 404, 40 L. Ed. 473.

The Act of September 1, 1888 (25 Stat. 452), was a ratification of an agreement made with the Shoshone and Bannock Indians for the surrender and relinquishment to the United States of a portion of the Fort Hall Reservation in the territory of Idaho for the purpose of a townsite, and for a grant of right of way through said reservation to the Utah and Northern Railroad Company for other purposes. The consideration paid for the right of way for the railroad was \$8.00 per acre. This agreement is referred to for the purpose of showing that there is no intention on the part of Congress to take from the Indians any of the lands within the reservation without proper authority so to do nor without just compensation.

The lower court's reasoning that the Department of Jus-

tice has no greater right than the Secretary of the Interior, is answered fully in the case of United States vs. Malle Lac Band, 229 U. S. 428, 57 L. Ed. 1299.

Third Proposition.

The number of acres granted by the United States to the Bannock and Shoshone Indians was limited by the terms of the treaty, and to hold that lands could be taken by the Secretary of the Interior, would be doing an injustice to the Indians and depriving them of the right guaranteed by the Constitution of the United States that private property cannot be taken for public use without just compensation, and a deprivation of an equal protection of the laws. In the well known case of Minnesota vs. Hitchcock, the court used the following language which bears upon the question of the right of compensation (185 U. S. 389, 46 L. Ed. 963): —
 “Whether this tract, which was known as the Red Lake Indian Reservation, was properly called a reservation, as the defendant contends, or unceded Indian country, as the plaintiff insists, is a matter of little moment. Confessedly, the fee of the land was in the United States, subject to a right of occupancy by the Indians. That fee the Government might convey, and whenever the Indian right of occupancy was terminated (if such termination was absolute and unconditional), the grantee of the fee would acquire a perfect and unburdened title and right of possession. At the same time the Indian’s right of occupancy has always been held to be sacred; something not to be taken from him except by his consent, and then upon such consideration as should be agreed upon.” Buttz vs. No. Pacific R. R. Co., 119 U. S. 55, 30 L. Ed. 330; Cherokee Nation vs. Southern Kansas R. R. Co., 135 U. S. 641, 34 L. Ed. 295; New York Indians vs. U. S., 170 U. S. 1, 42 L. Ed. 927; U. S. v. Mille Lac Band, 229 U. S. 498, 57 L. Ed. 1299.

The treaty with the Indians should be construed in a way that would do exact justice to the Indians, 175 U. S. 1, 44 L. Ed. 49, *Jones vs. Meehan*:

“In construing any treaty between the United States and an Indian tribe, it must always (as was pointed out by the counsel for the appellees) be borne in mind that the negotiations for the treaty are conducted, on the part of the United States, an enlightened and powerful nation, by representatives skilled in diplomacy, masters of a written language, understanding the modes and forms of creating the various technical estates known to their law, and assisted by an interpreter employed by themselves; that the treaty is drawn up by them and in their own language; that the Indians, on the other hand, are a weak and dependent people, who have no written language and are wholly unfamiliar with all the forms of legal expression, and whose only knowledge of the terms in which the treaty is framed is that imparted to them by the interpreter employed by the United States; and that the treaty must therefore be construed, not according to the technical meaning of its words to learned lawyers, but in the same sense in which they would naturally be understood by the Indians.”

“The title to the strip of land in controversy, having been granted by the United States to the elder chief Moose Dung by the treaty itself, and having descended, upon his death, by the laws, customs, and usages of the tribe, to his eldest son and successor as chief, Moose Dung the younger, passed by the lease executed by the latter in 1891 to the plaintiffs for the term of that lease; and their rights under that lease could not be divested by any subsequent action of the lessor, or by Congress, or of the executive departments. The construction of treaties is the peculiar province of the judiciary; and, except in cases purely political, Congress has no constitutional power to settle the rights under a treaty itself. *Jones v. Meehan*, 175 U. S. 1, 44 L. Ed. 49; *Wilson v. Wall*, 6 Wall. 83, 89, 18 L. Ed. 727, 729; *Reichart v. Felps*, 6 Wall. 160, 18 L. Ed. 849; *Smith v.*

Stevens, 10 Wall. 321, 327, 19 L. Ed. 933, 935; *Holden v. Joy*, 17 Wall, 211, 247, 21 L. Ed. 523, 535."

The lower court based its decision largely upon the case of *Rio Verde Canal Co.*, 27 L. D. 422, opinion being rendered by Secretary Bliss, who overruled the case of *Florida Mesa Ditch Co.*, 14 L. D. 265, and the decision of March 14, 1898, 26 L. D. 381. The reasoning of the Secretary is considered unsound, as it is said by him in the course of the opinion "The granting of the right of way over such territory is but the exercise of the right of eminent domain, which is not in violation with the treaty made with the Indians or of its obligations to reserve the lands for their sole use and benefit free from intrusion by others." If the Secretary is correct in his premise, then the element of compensation is lacking and the plaintiff in this case is entitled to recover the value of the lands thus appropriated. But is the Secretary exercising the power of eminent domain in granting right of way across lands reserved from sale or other disposition by the Government? The answer must be in the negative as the power of eminent domain guarantees the right of judicial inquiry before a court of one's peers, and is not exercised in a summary way. The legislature cannot fix the compensation or prescribe the rules for its computation. *Lewis on Eminent Domain*, Sec. 461.

Upon the other hand, if the Secretary is exercising the power of eminent domain, and has put the machinery in motion by permitting the irrigation company to appropriate the lands as set forth in the complaint, then there still remains the right of the plaintiff to compensation which must be determined judicially. The action instituted is for that purpose. *Lewis on Eminent Domain*, Sec. 461.

The Plaintiff in Error now adverts to another proposition, namely: Has the Government the right to recover damages if the Secretary of the Interior had no authority

to grant the permit for the construction of the reservoir site?

It will be conceded by the Defendant in Error, no doubt, that if the Secretary had no right to grant the permit, then the act was void and becomes *functus officio*, and no action upon the part of the Government will be required to cancel or revoke such permit. But the defendant in error, having already constructed the reservoir and impounded water therein, is liable and the plaintiff in error is entitled to compensation for the value of the lands unlawfully appropriated. Injunctive relief might have been obtained if the officers of the Government had been apprised in time of the commencement of construction upon the reservoir.

In law the unwarranted appropriation of land is equivalent to the taking of it and the defendant should be held to respond in damages to the Government, the custodian of the Indians, to the amount of the value of the land so taken. Angel, in his work on water courses, Section 465, says: "But there are numerous authorities sustaining the doctrine that a serious interruption to the common and necessary use of property may be equivalent to the taking of it, and that under the Constitutional provisions, it is not necessary that the land should be absolutely taken. Whenever there is actual physical invasion, compensation is due and the law then fixes the measure of that compensation to be the valuation of that part taken plus the damage to the remainder of the property resulting from such taking. *Louisville & Franklin Ry. Co. v. Brown*, 17 B. Monroe 763; *Hollister v. Union Co.*, 9 Conn. 436; *Sharp v. U. S.*, 191 U. S. 341.

It is conceded that the Government holds the lands in question in fee, but in trust for the Indians, and inasmuch as the Government is the proper party to institute the proceedings in behalf of the Indians, the compensation for the lands would be held by the Government in trust in lieu of the part of the lands so taken. In other words, the Indians

should receive compensation for their lands the same as a private individual should receive under like circumstances, under the principle that private property cannot be taken for public use without just compensation.

The trial Court erred in sustaining the demurrer of the defendant, and it is respectfully suggested that this Court should reverse the ruling, direct the trial court to try the case on its merits, and submit the question as to the value of the lands to a jury.

Respectfully submitted,

JAMES L. McCLEAR,
United States Attorney.

